THE GRAMMARS OF ADJUDICATION

The economics of judicial decision making in fin-de-siècle Ottoman Beirut and Damascus

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The economics of judicial decision making in fin-de-siècle Ottoman Beirut and Damascus

Zouhair Ghazzal

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Page of a nineteenth-century Damascus sharī'a register.
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Introduction

Adjudication and judicial decision making as discursive practices

This book has been long in the making. Originally construed as an exploration into the writing of history for Ottoman societies, it has gradually evolved into an inquiry into the possibility of constructing discursive formations centered around the agency of an active self for those same societies. In effect, the present study combines both dimensions—the writing of history in light of discursive formations—as discourses are looked upon through their historical formations.

Notions of agency and culture, self and discourse, have become common ground in western civilization, but are rarely elaborated for societies and civilizations whose contribution to modernity is considered as problematic. In effect, a "text"—any "text" for that matter—presupposes an "I" or a "self" in the making and forming of itself within a culture, even though in many cases that subjective agent is hard to detect, while its "intentions" beneath the layers of statements and discourses are even more obscure. In the case of Ottoman societies, contemporary historiography has been keen in the last few decades to focus on the objective side of social and economic relations. Such relations are looked upon as an objectively organized world by means of the institutions that have made their existence possible. The downside of such an approach, however, is that all kinds of textual evidence, out of which the historian patiently reconstructs the institutional logic of those societies, are used precisely in their role as "material evidence" for what effectively took place. Those texts—often referred to as "records" or "documents"—are seldom discussed in terms of their discursive formations and the representations that they carry. We are therefore in the strange situation where all kinds of texts achieve an evidentiary role through their excessive historiographical use, but the way such texts were drafted, including their discursive logic and their authorial intentions, remain for all intents and purposes unexplored. The Ottoman Empire thus appears endowed with a richly intriguing *civilisation matérielle* without, however, corresponding systems of thought.

To be sure, Ottoman societies did not manifest the creative energies of the early Islamic empires, such that their intellectual movements and infrastructures seem no more than a continuation of movements that had matured through ʿAbbāsid absolutism, and of practices introduced during the Seljūq, Mongol, and then Mamlūk rules. Such practices were mainly characterized by a general decline of centralized bureaucratic values in favor of more parceled out and fragmented jurisdictions governed by militarized *amīr*s ("princes"), in conjunction with the urban power of the provincial notables (*aʿyān*). Thus, the excessive militarization of public life, in conjunction with the massive ownership of rural lands by the state, placed the urban bourgeois and merchant classes into positions of subservience to the local notables, who for the most part received their land-tenures from the *amīr*s, on the one hand, and the militarized imperial bureaucracies, on the other. In short, and despite attempts to create a semblance of urban life through investments in mortmain endowments (*waqf,* pl. *awqāf*) funded either by private parties or high-ranking officials, cultural and political life was still heavily dominated by the imperial center, so that no effective bourgeois life came into existence, one that would have at least provided for a semblance of cohesion and autonomy to the cities.

The Ottoman Empire was thus *grosso modo* a continuation of such practices and their refinements into what turned out to be an effectively planned bureaucratic experience with a multitude of regional backups. Yet, despite bureaucratic achievements and organization, in the domain of the law (*qānūn*) in particular, it remains to be seen what the discursive formations of those societies looked like: What was their mode of organization in relation to the societies from which they had emerged, and according to which logic were they related to past and present practices?

To begin with, we need to question why such an enterprise proves beneficial, and what are its advantages within the historiographical writings of the modern Middle East. Discourse analysis foregrounds the "modes of thought" predominant in a society at a particular juncture, forcing us to think in terms of the main societal ideas without, however, necessarily fragmenting them into their disciplinary components. Aspects of a legal discourse, for example, might be shared by mystical ṣūfī practices, which, in turn, might act in conjunction with broader components of state ideology. If our overriding concern is focused on representation and discourse, it is because texts embody or enact meaning and make ideas palpably present to the imagination. In other words, texts embody a "personality" of their own, but only if their logic is *in toto* respected and reconstructed.

The notion of "discourse analysis" is central to my investigation of the judiciary. By "discourse" is meant a linguistic construction of a general nature

that enables society to make itself meaningful to itself. Considering that words and statements are the building blocks of texts, it is indeed the deep analysis of individual texts, and their juxtaposition with other texts, that leads to the discovery of broader discursive formations. In this enterprise of inter-textual analysis of knowledge production, texts of different epistemological backgrounds, which might have been produced by rigidly compartmentalized disciplines and professional fields or institutions, are questioned irrespective of whether they represent "fact" or "fiction," "theory" or "practice," "subjective" or "objective" criteria, "science" or "imagination," etc. Moreover, besides the whole issue of the "author" and the "author's intention," the way the *reader* (or hearer) "understands" a text—its *performative* role—proves to be a more fruitful approach. Indeed, the purpose is not only to reconstruct what all those texts intend to say on a specific issue—e.g., crime and punishment—irrespective of who drafted them, but also to understand how practices have emerged out of such constructions, and how they were "received" and "understood" by particular audiences.

To be sure, the notion of "text" need not be limited, as it often is, to the "literary" production of a society, and should be expanded to all kinds of written or non-written materials. For the purposes of this study, a heterogeneous textual material—all of which falls within a broad definition of the "legal"—has been juxtaposed together with the explicit aim of looking at judicial norms from a multitude of perspectives. Thus, jurisprudential *fiqh*[1] manuals, epistles (*rasā'il,* s. *risāla*), responsa (*fatāwā,* s. *fatwā*), religious sharī'a court records, minutes of the regional councils, and sultanic ordinances have all been brought together to examine their inner logic and how they embody meaning in their practices. The purpose is to perceive the overall logic of such discursive practices, which were dispersed along several institutional frameworks, from the assemblies of the scholars of the law, up to the sharī'a courts, regional councils, and sultanic ordinances.

Such an enterprise, however, does not come without its own risks and methodological problems. To begin with, even though I have repeatedly used the expression "Ottoman legal system" in this book, it remains uncertain whether such diverse discursive practices could in effect all fit within one "system," meaning a comprehensive set of normative values that would act together in one coherent whole. (I specifically address that issue in Chapter 4,

1. Comes from the verbal root *faqiha,* which means to "understand" and "comprehend." *Fiqh,* commonly translated as jurisprudential knowledge (a philosophy and epistemology of law and justice), means, more broadly, the elaborate understanding of something in its smallest details. The *uṣūl al-fiqh* are the general rules (*qawā'id*) through which other more specific rules, rulings, and opinions could be deduced, a process known as *istinbāṭ,* and which is mostly analogical.

namely the question of the juristic and judicial representations of property). Rather, what emerges is an inconclusive amalgam of diverse representations whose overall incongruence only reflects the various institutional frameworks from which they had emerged. Thus, while quasi-*private* property transfers, mostly along kinship lines through procedural fictions, took place through the sharī'a courts and hence were in accord with some of the basic rules of Ḥanafī practice,[2] state-owned *mīrī* lands (the *de facto* eminent domain, which supposedly were "private" in pre-Ottoman times) fell for the most part under the jurisdiction of the regional councils. More importantly, however, the late Ḥanafīs did not contribute much towards an understanding of the *mīrī-iltizām* system (a system for granting and collecting state taxes, surtaxes, and "rents" of various kinds) and remained entrenched in the old parochial concepts of property, rent, and taxation. We are thus left with various notions of property and contractual rights mirroring different aspects of the "system."

The inconclusive nature of socio-economic relations comes in conjunction with another poorly understood phenomenon. It is generally assumed that a legal system operates in conjunction with a socio-economic one. Yet, and considering the problems in defining the "legal" in such societies, which I will limit to juridical and judicial norms, the encounter with an "economic" sphere as such is even more problematic. In fact, and this should come as no surprise, there were no autonomous discourses of "economy" or "political economy" in Ottoman societies. If "economics is a form of social inquiry peculiar to capitalist societies,"[3] then it is indeed no surprise that Ottoman societies failed to produce such a literature. Yet, much of contemporary Ottoman historiography has specifically centered on what it labeled as the "socio-economic" without addressing the fundamental issue of a lack of an indigenous literature on the "economic." But considering the impossibility of such a literature, the issue then becomes of whether the "socio-economic" could be addressed on its own, as if endowed with its own rationale and mode of existence.

Indeed, the problem runs much deeper since not only the "economic" could not be addressed outside the "legal," but both spheres, in turn, cannot co-exist

2. Ḥanafism is one of the four legal schools in Sunni Islam and was adopted by the Ottomans as their official school, see Chapter 1 *infra.*

3. Robert Heilbroner and William Milberg, *The Crisis of Vision in Modern Economic Thought* (Cambridge: Cambridge University Press, 1995), 109-10: "The crisis of vision in the major recent economic developments is the failure even to acknowledge, much less explore, this inextricable link [between economics and capitalism]. To deny it is drastically to reduce the effectiveness of economic thought as a tool for understanding society. To use representative agent rational choice as the organizing principle for thinking about modern organized capitalism not only limits the scope of economics, but skews it in a direction that is incapable of providing a compelling explanation of our experience."

outside the discursive totalities of Ottoman societies. For that very reason, I use both "economic" and "legal" in conjunction with a totality of discursive practices, while I avoid Ḥanafī "law" in favor of the more elusive Ḥanafī practice. The point here is to be alert on how these societies have discursively framed their own practices, while avoiding simple-minded anachronisms. Then, at another level, the construction of discursive practices would take into consideration how those societies had framed their views on the state, the economy, the market, and the law. Otherwise, such entities would seem like oppressive words without much content, and with modern connotations injected into them.

I therefore assume that in Ottoman societies neither the "economic" obeyed the rules of nineteenth-century capitalism, nor did the "legal" as such fall within the domain of "rational" law. In fact, as I argue in Chapter 3, the laws of property and contract were not even framed within clearly defined notions of "production" and "labor." Moreover, since both the economic and legal cannot be dissociated from the totality of discourses produced in society, their respective roles must therefore be considered in conjunction with the religious, moral, political, and hence with the linguistic components of those cultures.

Considering that Ottoman societies did not produce an economic literature as a form of inquiry, by contrast the fiqh as a form of jurisprudential knowledge could pose itself as a domain whose mode of inquiry was total, even encompassing an implicit economic rationale. To begin with, I argue in Chapter 1 that the scholars who worked in the domain of the fiqh did so on the basis of a total experience, and with an awareness that both the juridical norms and the customary practices of a particular society could only be formulated within a linguistic framework, one which in effect begins with God's discourse (*khiṭāb*) as a source of normative rules and open for interpretation through the multi-faceted enterprise of the fiqh. It is within such a framework that property and contractual rights would find their place—one where *ex cathedra* rights had a prime importance. But property and contracts notwithstanding, the "economic" would have to be formulated through the juridical norms of the fiqh and the process of judicial decision making. With such an undertaking, we will, to be sure, reach a level of legal and economic inquiry that would not have to rely solely upon modern notions.

One major advantage of an approach that reconstructs the discursive norms of a society is that a blatant anachronism with modern notions can be avoided. It has thus become customary to question the "economic" in modern Middle Eastern societies with notions such as unemployment, inflation, price, profits and earnings, not to mention the dubious division between state versus private enterprises, all of which assume fully operative capitalist economies and

hence an economic form of inquiry developed by those societies. Yet, nothing remains more uncertain than such presuppositions. For one, they assume that the same concepts could be fully operative and meaningful across the board. For another, there is no concern with any language produced by the societies in question which might shed some light on how the economic is thought of in conjunction with the the legal or the political. Finally, capitalism in its developed form assumes at its bare minimum a process of capital accumulation, a market allocation, and a sharp divide between private and public realms, all of which have yet to materialize in our kind of societies, before some basic economic notions become operative and meaningful.

Our démarche is therefore concerned with the status of "knowledge" (*'ilm, ma'rifa,* and also *fiqh*) in Ottoman societies, and whether from such a standpoint future research would follow the thread up to the colonial and post-colonial periods, thus opening to the possibility of historically construed social, economic, and legal thought. Several caveats, however, stand in the way of such an operation. To begin with, the historicity of the fiqh enterprise is questionable, and we are confronted with the broader problem of the representational in pre-modern discourses. In fact, even though such discourses do normally operate within a notion of time and space, they do not historicize their practices in such a way as to perceive their discursive units as the outcome of a particular historical epoch. They act *against* time, it is safe to assume, by looking at their enterprise globally in terms of a totemic origin and founding fathers whose achievements constitute the "foundations" (*uṣūl*) of the school (*madhhab*). A "hermeneutic circle" thus develops in which layers upon layers of interpretations are left without their historical connotations. The historian is thus left with the arduous task of historicizing the hermeneutic enterprise of past scholars, but again, it would only do a disservice to behave anachronistically and assume that each historical period comes with its own social relations and brands of discourses. In fact, such a modern view of historical change, one that usually assumes a "democratic" approach from the bottom of social relations up to the legal and political relations, might force into Ottoman societies a discursive coherence that was not even there in the first place. Moreover, and since scholars did not frame their own enterprises historically, this lack of historical self-reference cannot be projected by a modernist discourse at all costs. In short, the historical nature of change in Ottoman societies is a difficult matter with which we need to experiment more carefully before reaching any conclusions on the nature of that change.

The other difficulty hinted at earlier, one in conjunction with the historical problem outlined above, concerns the way "cases" and "texts" were constructed. Again, as before, anachronism is a danger. In fact, we are used to systems of justice where the "case" is constructed as an external object

of investigation, and whose outcome should be objectively scrutinized. Such objectively construed procedures, however, besides their social cost, assume an epistemological ground which is far from being universally applied. From all the cases contained in this book, it is not that difficult to discern that an objective epistemological stance does not apply here, and that the object of each case tends to be construed through procedures, and often on a fictional basis (see Table 2-2 *infra*). Thus, the contact with the object is not what really counted, and what mattered were procedures of validation (more so than verification and objectification), mostly through witnessing, but also through a bargaining between the two parties and the judge. But since witnessing did not involve any examination or cross-examination, and since the "facts" were provided by the participants themselves and their validation was at the mercy of the other party, the construction of each case rested on purely procedural matters.[4]

To avoid anachronism we need to listen carefully to the texts of the scholars and see how they managed to formulate their legal concerns within broader notions of language, discourse, interpretation, and hermeneutics (see Chapter 1). Both custom and the practices of the courts were perceived in terms of their linguistic components which were to be limited mostly to the "external manifest meaning" (*al-ma'na al-ẖaqīqī*) accepted within the community. That meaning could even override an established norm in the canon, unless originating from a Text (*naṣṣ*) of a holy nature. Evidence within the court system was, in turn, based on the linguistic performance of the disputants and the judges (see Chapter 8), so that an acknowledgment (*iqrār*) from the other party, or a silence on evidence, meant the acceptance of statements of an evidentiary nature uttered in court. Even in homicides, evidence was no differently managed as it did not rely upon an objectification of the crime, but rather on the tool-of-the-killing as evidence (see Chapter 11). Litigation thus absorbed communal feuds by proposing contractual settlements.[5]

The set of methodological problems explored thus far reveals difficulties that scholars encounter with pre-modern discourses in general, and also points

4. From his research of the Moroccan judicial system in the 1940s, Jacques Berque was drawn to similar conclusions in his *Essai sur la méthode juridique maghrébine* (Paris, 1944), 52: "À aucun moment, le cadi n'a de contact avec l'objet, censé se construire du débat lui-même"; 26: "En un mot, ce qui importe, c'est moins la justesse de la décision que ses fondements spirituels, ses motivations logiques; c'en est moins le contenu que les ressorts internes. La plus juste sentence, ce ne sera pas la plus adéquate à l'espèce, mais la mieux assise en science et piété"; 66: "Corrélativement donc l'intérêt se déplace ici du jugement sur le juge, et du droit sur la preuve."

5. Similar in some respects to what David Cohen has diagnosed for fifth-century Athens, see *Law, Violence and Community in Classical Athens* (Cambridge University Press, 1995), in particular Chapter 5: "Litigation as feud."

to the broad division between formally rationalized systems and those not formal enough to engender systematic codes. In the same way that economics as an autonomous discourse only begins to exist with the advent of capitalism, so does a formalized system of justice. In Ottoman societies, there was too much influence from the religious and political, and too much of an economy that was based on status, rank, and the massive state ownership of property (hence capital as rent), for the judiciary to act as an autonomous system on its own with all the implications of such an autonomy (for example, a predominance of purpose contracts over contractual settlements affected by status). Thus, even though modern research has pointed to the fact that even "formal" systems of justice tend to be influenced by extra-judicial factors, in particular when it comes to crime and punishment,[6] the difference between modern systems of justice under laissez-faire capitalism, and others where the juridical acts in conjunction with extra-legal norms, should not be underestimated. Such distinctions are crucial to understand the transitional character of many legal and economic systems today.

The blank point in contemporary historical research

Ottoman historiography has created a "neutral" discourse—from the "outside"—for its social and economic history, which, in the last few decades, has set itself as the dominant genre. Texts and documents are thus *used* for different purposes, but the material is not *worked through* them; that is, this socio-economic history is reconstructed without any concern as to how those texts themselves might generate knowledge of those same entities that modern historiography envisages as "essential" from its own perspective. But not only should we ask whether they were "essential" from the perspective of those texts which served as the "raw material" for the historian's own narrative, but more important, whether they all came as one of those discursive tropes that organized the textures of those indigenous texts. Were such things as labor, employment and unemployment, price, taxation, and rent raised to the status of discourse, and under which circumstances? The modern historiographical discourse achieves, at times, even for societies with an abundant literature and a massive documentation, as is the case with the Ottoman Empire, the status of the anthropological narrative, which is primarily aimed towards those *sociétés sans écriture.* Because they lack that capacity of *writing* their own narratives—even though their *oral mythologies* are looked upon as

6. Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russel Sage Foundation, 1979, 1992).

narratives of their own—the anthropologist becomes the one who reconstructs in writing the discursive narratives that those societies could not complete on their own. And even if the anthropologist manages to multiply interviews, personal observations, and direct fieldwork notes, scientifically reconstructed narratives remain by and large without much challenge from indigenously created texts. Historians of the Ottoman Empire, even though they have at their disposal a massive textual evidence, behave in a way no different from an anthropologist who has to reconstruct everything from scratch, while using everything at his or her disposal precisely as mere *evidence,* no more.[7] We are therefore faced with societies whose discourses seem to represent no major interest to the historian: either because they seem remote from the historian's preoccupations, or else are silent on what modern historiography is mostly preoccupied with (particularly the Braudelian *civilisation matérielle*), or else the "factual elements," which they supposedly carry, have more value than their discursive representations.

The essential question therefore comes down to being able to construct the historical evolution of disparate discursive practices for Ottoman societies, while bypassing the dubious distinctions of "theory" and "practice," or "material life" and "epiphenomenal superstructures." Thus, and to limit myself to one obvious example regarding the traditionally accepted "material infrastructures," such things as property, contract, tort and crime, all shared similar representations within the discourse of the fiqh, and it remains to be seen whether it would be possible to trace them within an historical perspective of any value. This implies, for example, that a concept such as property would be discernable specifically for the nineteenth century, and that an evolution of that concept would be possible to track genealogically from previous periods. But, upon closer examination, we are faced, on the one hand, with the possibility of several discourses on property emanating from different power relations, and with the other possibility that the practices of the courts and the

7. For an alternative approach, see Dror Ze'evi, "The Use of Ottoman Sharī'a Court Records as a Source for Middle Eastern Social history: A Reappraisal," *Islamic Law and Society* 5, no. 1 (1998): 35-56. Ze'evi emphasizes a micro-historical approach to the sharī'a courts à la Giovanni Levi which would take into consideration the "thickness" of each text. But micro-history notwithstanding, the problem of the "legal" nature of each "record" is what stands out the most, and is, in the final analysis, what gives shape to historical writing. On recent trends within the *Annales,* which also take micro-history as its main thread ("small is beautiful"), see the collective work of mostly French and Italian historians under the direction of Jacques Revel, ed., *Jeux d'échelles: La micro-analyse à l'expérience* (Paris: Seuil-Gallimard, 1996). The 1980s *Annales* "crisis," which was attributed to a revision of the status of history within the social sciences, has led to a change in the subtitle of the journal to "Histoire, Sciences sociales," see "Histoire et sciences sociales: Un tournant critique?," *Annales, Économies-Sociétés-Civilisations* [hereafter *É.S.C*], 2, April-March (1988): 291-93. The "new" *Annales* has nothing to propose but an anthropological micro-history along the lines of Marshall Sahlins, *Islands of History* (Chicago: University of Chicago Press, 1985).

firmans emanating from the imperial center might also reveal a not so explicit discourse on property. The whole problem of congruence (or lack of) among such discursive practices—assuming, of course, that several did in effect co-exist—emerges as crucial. Property would then look not only as something that could be acquired, possessed and occupied, transmitted, inherited, purchased or leased, or confiscated by the state, but also as something that is normatively constructed alongside contract, tort and crime.[8]

An *idée reçue,* however, comes into the picture whenever reconstructing the logic of discourses that are locked into their past. Because, for example, the fiqh literature works in reference to and in a self-declared harmony with a variety of canonical texts, whose scope varies in importance from the scriptures to the foundational texts of the school, one needs a great deal of skill to discern what would then be considered as "belonging" to a specific period, say, the nineteenth century. In effect, an opinion is typically stated in conjunction with an analogical set of statements from earlier periods, and which could be juxtaposed together into no particular textual order, but all of which were brought for the specific purpose of manifesting an adherence to a tradition. The difficulty then becomes in being able to discern from the plethora of declared opinions and counter-opinions in the *shurūḥ* (interpretations of positive law manuals, which as a hermeneutical process provides an "update" to canonical notions) and *fatāwā* ("responsa") manuals, both of which were the dominant nineteenth-century genre, the ones that manifest best the author's "own period." We should therefore discern with great care what scholars and lawyers delimited as their own "space" (that is, geographic era) and own period, so that such commonly used terms as *bilādu-nā* ("our homeland")

8. In the French *Code civil* of 1804, which represented itself as a new beginning and a radical departure from the old feudal and aristocratic rights, and also from the *droit coutumier* of the provinces, "ownership is the right to use and dispose of property in the most absolute way." An outcome of that absolute ownership notion "was the separation between property rights and civil liability." Thus, not only "the common law of property rights is not absolute when compared with its civil law counterpart," but more important, "in the common law tradition the notable divorce between property and liability, typical of civil law systems, never occurred." See Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: The University of Michigan Press, 1997), 34-35, 39; idem, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Westport, Connecticut: Greenwood Press, 2000).

Even though the advance of capitalism and the need to foster efficiency in both law and economics has done much to bridge the gap between common and civil law systems, the distinction remains historically valid and even unexpectedly clarifies how notions of contract and property have become confusingly intertwined in modern non-Western legal systems. Thus, as noted earlier, the Ottoman notion of property seems much closer historically to English feudalism upon which the common law courts based their decisions. The Ottomans, however, like many Middle Eastern societies, abruptly shifted by the mid-nineteenth century to systems close to the Napoleonic Code, or at least inspired by it. Yet, such a transition took place with all kinds of old property rights still protected so that the distinction between *taṣarruf* and *tamalluk* did not die with the new codes, and even has witnessed several chances of revival.

and *zamānu-nā* ("our time") have to be contextualized within the layers of discourse which juxtapose various periods together.

We are therefore juxtaposing in a single photographic frame such things as *shurūḥ* manuals, epistles (*rasā'il*), edicts (firmans) and sultanic ordinances, responsa, and court records, all of which are situated within their *own* languages and grammars. The purpose is to see how various texts, which for the most part have been created independently of one another, and which might have ignored one another's existence, can still work together. In fact, the "unity" of both the juridical and the judiciary (the decision making of the courts) is always assumed but never fully investigated. How do all those discursive elements come together, and should they come together at all? What purpose does a discursive practice serve if it fails to "connect" to what it was supposed to adhere to in the first place? If, for example, legal doctrine, the *shurūḥ* manuals, and the *rasā'il,* were a world apart from the fatāwā and court records, then what purpose did they serve within the enterprise of judicial decision making? And, more importantly, is it possible to discern an historical existence for all those discourses, one that would root them within a specific historical phenomenon rather than simply detect occasional changes in their structure? In short, we would like to render visible the structural principles beneath all the discursive practices that we are bringing together within the space of this study, and, more important, to unearth essential affinities between discourses that might seem remote from one another. How, in this totalizing perspective, those spheres can be reconciled, fused, integrated, and eventually collapsed into one another so as to form a single coherent historical phenomenon, is precisely the ideological problem at stake. Or, alternatively, if such discourses fail to reconcile, then what are the implications of such a failure?

Adjudication in light of judicial decision making

This study is divided between its first four chapters that pose the status of Ḥanafī doctrine in its fin-de-siècle form before it was phased out as the main source of law and adjudication, on the one hand, and the following chapters that propose individual case histories of court and regional councils, on the other. The purpose is therefore to analyze judicial decision making and its relation to legal doctrine formation. One thing that clearly emerges from the case studies is that their procedures were perfectly routinized to the point that the judge was only left with a predictable outcome. In fact, most of them were contained within well regulated procedural fictions that would formally pose the case as a litigation between disputants, each claiming long vested rights over a property or set of properties. By contrast, even though genuine litigations had

more unpredictable structures and outcomes, "hard" cases were often settled thanks to a muftī's fatwā (a jurisconsult's responsum, see Chapter 7 *infra,* and more specifically, C 7-2, 8-2, 11-7 & 11-8),[9] but those were a rarity in a sea of well routinized procedures. In effect, such well crafted procedures simplified tremendously the task of selecting cases through "type-contracts." Cases could be organized into different topoi such as sharecropping, waqfs, crimes, property transfers, and then finessed even further into smaller subtopics; the problem then becomes one of discerning a global structure, if any, for each topos: for example, did some or all of the sharecropping cases fall under one general structure? If the answer is positive, then it wouldn't matter for our purposes which case is chosen. In fact, once a particular procedural structure is detected as a topos, other similar cases, either from earlier or later periods, would only matter as long as they manifested significant procedural differences, at least ones that would show a substantive shift. Otherwise, the small varieties that might be detected within a topos—or a type-contract—could be relevant from the standpoint of social history in that the data contained in each case would form the base for a statistical, descriptive, or analytical work of some kind. However, the meaning of such data is primarily revealing in the context of the structure of adjudication that made the case possible in the first place, while social and economic history only helps in widening that legal context by bringing societal elements that the law only vaguely assumes as present. Procedural fictions (Table 2-2) were thus no more than concealed, embedded contractual settlements whose purpose was to validate property rights that would have been otherwise difficult to validate under normal procedures. Each one thus constitutes on its own a type-contract, or a contractual formula, elucidating the structure of cases that would otherwise be incomprehensible and dissociated from one another.

The meaning of specific procedures could thus be individually detected for each case. Considering that the fiqh manuals were generally short on procedures—and even more so on procedures that would effectively work at a particular time, location, and case—how were they worked out, and who constructed them? And, finally, how did they relate to the fiqh literature? One way to understand court procedures is to perceive them as discrete units—or as "plug-ins"—which could make sense either individually in relation to the fiqh literature, or as part of a procedural structure, hence in relation to one another and to the case at hand. Let us assume for the sake of simplicity that a procedure involves five different steps beginning with the plaintiff advancing

9. For a brief description of those cases, see *supra* "table of cases," and the respective chapters for a detailed analysis.

her claims against the defendant, and ending with the judge closing the case with a ruling. Generally speaking, each step ought to be looked upon as conforming either to a general or specific rule in the fiqh; but when all steps are placed together side by side in the order that they were introduced in the case, a procedure emerges and the implications of each step might indeed change within that context. For example, several of our cases involve a debt-procedure (Chapter 5 *infra*). Among Ḥanafīs, the concept of debt shares a long history beginning with the notion of debt as a form of property: the debtor owns as property what his creditor exchanged with him (*tamlīk al-dayn*), the latter is in turn possessed by the lender once the borrower refunds his debt; it thus falls side by side with the property of the tangible thing (*'ayn*), and "usufruct" (*manfa'a*) (a fourth form of property consists in the husband possessing his wife's vulva, an outcome of the marriage contract). However, the debts that initiate our cases were not genuine ones, and their purpose was precisely to *initiate* a (fictitious) lawsuit so that the defendant's (or his representative's) non-payment of a (symbolic) debt from the plaintiff (or her representative) becomes a *delictum* that needs to be addressed by a sharī'a court. But such a reading of the debt-procedure is only possible in the context of the case as a whole, which might end up with a contractual settlement (or a type-contract) in which the debt only served to initiate the suit and to identify the alleged disputants and their representatives.

Once the plaintiff initiates his or her claim, it then becomes a question of who—between plaintiff and defendant—can furnish evidence, and *how* that evidence is furnished. On both counts, however, the courts clearly and unmistakably follow either the general or derivative rules of the fiqh (see below), but it all comes down to how they were juxtaposed together in conjunction with other procedural links to constitute a "case." In fact, once looked upon in the context of the case as a whole, the procedural links will, to be sure, be perceived altogether differently.

Out of the large number of opinions that were produced in the long history of the fiqh, some were forgotten and fell into desuetude, while others were still debated by jurists even though their practical significance remained uncertain, and a final category of opinions was "in use," at least in the sharī'a courts. But what was it then that defined, for Ḥanafī practice, its major paradigms for a historical period? And did such a practice think in terms of a congruence with an historical phenomenon? In fact, it is one thing to construct the coherence of a body of fiqh texts by working out its historical evolution, and it is another to identify it with an historical phenomenon.

The issue that is of concern to us is that of adjudication. Adjudication, even though primarily a court activity, is not limited to the latter. In Islamic law, scholars and lawyers adjudicate among the opinions of their contemporaries

and predecessors; and muftīs (jurisconsults) have also to adjudicate, hence to draft responsa whenever presented with a hypothetical (fictitious) or actual (genuine) issue; so that the adjudication of a judge is one among several possible ones, even though the system as a whole only opens up to the wider public through the courts and their judges, hence their importance.

The Ottoman sharī'a courts were endowed with at least two interrelated but distinguishable functions: they determined facts, and they interpreted authoritative legal texts; it is also debatable whether they contributed in making any new law, or even pushed for new public policy. Only the second function, that of interpreting texts, is the most familiar and least problematic, while the other two could pose serious arguments. What kind of fact-finding did the courts do? Little, if any. To take one example among many, the reliability of the long list of disputed properties, usually included in each litigation (see Chapter 5), was hardly disputed by the courts. In fact, it was up to the opposing party to accept or challenge the accuracy of such factual information either partially or in toto. Moreover, confirmation was left to a couple of witnesses, who were never subjected to examination or cross-examination: their veracity was also left to be accepted or rejected by the other party. There was nothing that could be described as "investigative procedure" in any of the homicide and criminal cases analyzed in Chapter 11: indeed, in contractual settlements the aim was neither to investigate, punish, discipline, incarcerate, or rehabilitate an alleged criminal, but only to seal a contractual settlement between the parties. There are many arguments that could be put forward either in favor of or against fact-finding in Ottoman courts, some of which will be explored as we progress along our cases, both the civil and criminal, but it is possible to limit at the outset any false expectations as to the nature of "facts" in those courts. Fact-finding, as practiced in most modern legal systems, assumes investigative procedures that fit within a particular epistemology of knowledge, one that, since the eighteenth-century *Aufklärung* philosophy, assumes the duality of a knowing subject and an object to be known. Whatever the nature of the investigation, be it scientific, legal, or social (e.g., administrative), the assumption is that the object to be known must be constructed with the suitable research tools independently of one's subjective assessments (or values). Needless to say, if the Ottoman courts did develop any investigative procedures in any of their civil or criminal cases, their epistemological background is very different from the one commonly assumed today. To begin with, a "case," whether one eligible for a court hearing or a fatwā, was perceived among Ḥanafīs as *ḥāditha,* or "event," that is, as something unique enough all by itself to necessitate the intervention and care of a legal authority, be it a judge or muftī. The treatment of a case-as-event, however, required less a policy of fact-finding *from the court authorities* than finding a just and honorable solution to all involved. In

short, facts were *selectively* brought by the parties, and it was left to them to corroborate, accept, suspect, or reject.

Which brings us to the other crucial and equally controversial issue of judicial *policy* making. We know for certain that courts were supposed to interpret legal texts and base their decisions on such readings of texts, and this, to be sure, they did very well. (I temporarily leave here the issue of whether that involves interpreting texts of previous cases, and thus whether *precedent* plays any role.) However, policy making is involved whenever the courts create a new law—and one with "public" implications—one that either did not exist in the texts as such, or could not be reached through interpretation. Islamic law accepts *ijtihād,* or independent reasoning by means of analogy (*qiyās*), in the case of all jurists who have reached the status of *mujtahid*s, while Ḥanafīs did accept *ijtihād* even for judges. So the question is to see whether judges did create new laws that led to policy making or new decision making. The nineteenth century proved less promising than the previous ones: by that time, cases were far more routinized and more predictable; their range of topics had been reduced considerably even before the modernization of the courts (guilds, for example, had ceased, since the late eighteenth and early nineteenth century, to refer their litigations to the sharī'a courts); and "hard" cases—whenever there was one, which was a rarity—were routinely passed on to a muftī, if not by the judge himself, then by one of the parties (Chapter 7). All this does not point to any policy-making activity (or newly defined judicial decision making) and the enactment of new laws for that matter. It might indeed seem paradoxical that over time the activities of the courts have gradually been grossly simplified, with less and less out-of-the-norm cases showing up, while everything else does suggest that Ottoman economies and societies became more imbued with commercialism. Yet, in spite of the legislative activity in the pre-reform era, much of it was not destined for the sharī'a courts in the first place. Indeed, sultanic legislation, even though at times communicated to the courts and made visible in their registers (Chapter 10), was primarily relegated to the regional councils, even those of the pre-Tanẓīmāt.[10] In effect, judicial *policy* making as such belonged to those councils to such an extent that their policies often bypassed the legislation that they routinely received (Chapter 9).

10. The Ottoman Tanẓīmāt, or "reforms," were promulgated in two official edicts from the imperial center in 1839 and 1856, respectively. Their broad scope covered the equal treatment of non-Muslims, a more efficient and just bureaucracy, juridical reforms, and the abolition of the tax-farming *iltizām* system. Only the reforms imposed on the judiciary can be characterized as radical.

But despite the aggressive nature of the regional councils and the fragmentary nature of their legislative and decision-making process, the sharī'a courts were not left without some judicial inventiveness of their own. To be sure, one of the most underestimated and poorly-understood practices of the courts were those involving fictitious litigations (Table 2-2 *infra*). Procedural fictions were nothing but simulated contracts or conveyances validated through a fictitious litigation and a ruling. The aim was thus to go beyond a rigid law of contract and its limitations. But does that constitute genuine lawmaking or simply patching up bits and pieces of old procedural methods? As those litigations will be examined at length, let me suggest at this point that fictitious litigations did not touch upon substantive law but only stretched its procedures so as to accommodate the needs of the times. In effect, between full ownership known as *milk* and the state ownership of mīrī lands, there existed several categories of "possession," often referred to as "occupation" (*waḍ' yad*). The fact that possession was neither full ownership nor a form of lease as such, had led to a movement that pushed for ownership after a period of property occupation and use. Even though the general notion for claiming a property right through occupation was endorsed among Ḥanafīs, it was left to the courts to routinize all procedural matters to such a point that the hands-on technique became a main source for fictitious litigations, and hence for contractual settlements and conveyances. Moreover, the Ḥanafī law of contract has been much expanded through fiction to accommodate contracts where neither the delivery of the product nor the mode of payment were quasi-simultaneous.

The study of Ottoman adjudication remains fraught with obstacles; some are in relation to modern scholarship, while others are of an ideological or political nature reflecting how the judiciary perceives itself and how it is perceived in society. In the last three decades, historians have focused particular attention on sharī'a court documents, but only from the point of view of social history, thus bracketing off adjudication altogether. Firmans, laws, and edicts were neglected both as a source of social history and adjudication, but whenever taken seriously, the forms of adjudication implied in such documents were never an issue on their own.

But if adjudication has been forgotten in modern scholarship, it is because it is mostly perceived as an instrumental practice—that of "applying the law." What do judges do but "apply the law"? Applying the law generally implies either a *direct* interpretation of a text or statute, or, at best, a risky interpretation, one that forces the text in a new direction. Thus, even the possibility of a fully creative adjudication, one that pushes for new judicial policies, is typically occulted. Even in democratically administrated societies like the United States, judges are perceived as "applying the law" in an impartial and just way, to the point that it has often been argued that judicial *policy* making should be

looked upon as pure heresy and a deceit of the system, or a politicization of the legal, which in itself degrades the system, and it is only recently have such attitudes begun to change.[11]

How court narratives work: the benefits and limits of case analysis

This study, which in part centers on a selection of cases from Beirut and Damascus, would like to question the following premises: (1) What is a legal "case" in the context of an Ottoman shari'a court? (Or, alternatively, what does constitute a court case?); (2) Are "cases" relevant enough to be studied for their own sake on a one-by-one basis?; (3) Is the sharī'a court judicial decision-making process a case-law system, and what is exactly meant by that term?; (4) Assuming that "cases" are important enough on their own to get us into the system, how do we then analyze cases? Should they be looked upon as narratives that follow the same rules of speech as any other narrative? Or are they primarily *legal* narratives that obey the ground rules of the fiqh discourse?; (5) How do independent cases interconnect with one another so as to provide a broader picture regarding the inner functioning of the court system, and possibly even the legal system as a whole?; and, finally, (6) Are there cases that could be regarded as more important—or more relevant (i.e., "leading" cases)—than others so as to establish a hierarchy of cases within the system?

Students of the sharī'a court records—in particular those of the Ottoman period whose records are most extant—are generally faced with the indifference that those cases have received in legal circles. In fact, court cases, which are now particularly valued by historians, have just begun to receive the attention they deserve from legal historians and lawyers as well. However, those same cases were rarely, if at all, the subject of attention by the jurists of the Ottoman period, or the pre-Ottoman for that matter. Thus, unlike the responsa, which have often ended up compiled, revised, and edited, for purposes of maintaining the tradition among muftīs and scholars, or even for learning how to create new responsa through an *ijtihād* ("independent reasoning") process, these court cases have at no point in Islamic history been subject to any degree of scrutiny from scholars and lawyers. Nor did judges, who commanded the judicial decision-making process, manifest any interest in compiling even what might be considered as their "leading" cases. Moreover, the peculiar status of the sharī'a courts, as the bearers of law for the communities that they represented,

11. Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State* (New York: Cambridge University Press, 1999).

left them outside the hegemony of the state bureaucracy, whether central or local; hence no attempt was made to bureaucratize the system either. Nor was there any attempt by the Ḥanafī authorities, whose teaching and recruitment methods were conserved within the narrow circles of the *'ulamā'* (the scholars of Islam), to bureaucratize the system and keep track of decision making, or create a systematic judicial review (or "law reports"), which would have at least prompted more interest in the inner workings of the courts.

Rather than be left unbound in loose sheets, as they apparently were in pre-Ottoman times, cases were thus kept in their original qāḍī's registers (referred to—wrongly it seems—as *sijill*s in the Ottoman period, and *dīwān*s in the pre-Ottoman era), a process that definitely led to their long survival. But with no attempt from jurists to understand and formulate the *modus operandi* of decision making, those cases were left precisely for what they were supposed to be, as "events" (*ḥāditha*s) for which the judge had to give a "just" and fair ruling. The point here is that jurists and scholars alike felt no need to re-adjust and re-conceptualize their doctrine of adjudication (referred to as *adab al-qāḍī*) in light of the findings of the courts. In short, the courts were supposed to "apply the law," and hence their inner workings represented no special interest, not only with regard to legal doctrine, but to the *furū'* (positive law manuals) and *shurūḥ* (interpretation manuals) as well.

But did courts apply the law to "facts"? The notion of "fact" was close to what jurists understood by *ḥāditha* or *wāqi'a,* but in either case the "fact" was not any detail as such (or *datum*), but more like an "event" for which the judiciary had no immediate solution, but to which lawyers and judges must have paid special attention. Specifically, therefore, there was no conception of *datum* as such, but only of "events" that bear a particular significance to either doctrine or *furū',* some kind of datum-with-significance, if you wish. Those came concomitantly with the well known "questions" (*maṭlab, mas'ala*) of the fiqh manuals, in particular the *shurūḥ,* and, considering their importance, the faqīh must have seriously considered these as genuine challenges. But it is questionable, however, whether any of these "questions" and "events" posed any real challenge to doctrine so as to revise it substantively in any way. Thus, while "questions" and "events" were punctually treated and appended to the *shurūḥ* manuals as such, "cases" were left outside the realm of the fiqh manuals, whether *uṣūl* or *furū'*.

The difficulty that a legal historian therefore encounters is one of methodology. If cases, apart from being simply remembered by judges and their scribes and preserved in *sijill*s (disputants were also provided with copies of the *ḥukm* or ruling) for purposes of conducting the usual court's business, had no particular impact, should the historian therefore create for them a role that did not exist in the first place? In other words, if Ottoman jurists and lawyers

did not find it worthy to review their court cases, compile and edit them, and review, if necessary, their doctrine accordingly, then what kind of role is the modern historian supposed to find in those same cases? The importance of the question stems from the fact that, assuming that our enterprise is fully conducted, one can only hope for a *hidden* role to court cases, at least one that jurists never thought about, never addressed in their writings, but nevertheless had influenced the judiciary as such. Case analysis would thus acknowledge what the system itself had failed to admit in the first place. In other words, case analysis would have to construe a role to cases within the legal system in light of the non-acknowledgment of the system to such a role. An archeology of cases would thus achieve knowledge and understanding of the law by bringing cases, doctrine, and *furū'* together, an approach that the dogma of the fiqh avoided. Historians should therefore go beyond the assumption that the principles of the fiqh, which embodied anything from doctrine, *uṣūl, furū', shurūṭ* ("stipulations"), *shurūḥ, adab al-qāḍī,* and responsa, were exemplified in the court cases. In fact, such an attitude considerably reduces the canvas of experimentation that could be applied to cases, and the possibility that their relevance goes not only beyond the prescriptions of the fiqh, but more importantly, contributes towards an understanding of societal values.

Why is it crucially important to look at adjudication in terms of "cases" and "texts" in their totalities? Or should we bypass "cases" altogether? In any legal system, judges typically *exclude* all kinds of societal material that they deem "irrelevant" from their own perspective. They thus *frame* each "case" only from the perspective of the judicially relevant. A "case" therefore necessarily stands as a world on its own that exists for its own sake, to the exclusion of everything else. A case is therefore supposed to create consensus through a process of reduction to the bare minimum. In Roman law one had, in the case of a dispute, to pose the *quaestio iuris,* define the legal problem, and from there construct a "case" that separates the dispute from the network of kinship ties and political friendships. Islamic judges had to discover in their own way how to provide that kind of consensus to the disputants, their families and networks, and to society at large. Judges were not supposed to be charismatic, but each one of them had to evince enough aura to persuade and create consensus. An examination of all those techniques of persuasion, many of which materialize in the *writing* of the case itself, proves of fundamental importance.

Ignored by pre-Ottoman and Ottoman jurists, the empirical investigation of cases is generally met with great reluctance by historians who are anxious when it comes to iconoclastic theories of legal decision, some of which tend to push towards inherently indeterminate and contradictory principles of adjudication. Contextual information proves to be the most problematic, and, in the face of

uncertainty in terms of what the empirical elements of each case might bring, historians typically, if not unconsciously, revert to the opinions of scholars and lawyers that the law moves from case to case by following its integrity and its own internal logic. Such a logic, however, only reinforces the difficulties—all of which can be expressed in the form of conundrums—that any archeology of cases faces: If judges are only supposed to apply the law, what happens then when a judge encounters a case that does not fit within the usual norms of adjudication? When judges did provide an "explanation" to their *ḥukm*—which they seldom did—should such explanations be taken at face value as what eventually led to the ruling, or should other possibilities and motivations be explored? And, alternatively, when no explanation is provided, and when the ruling seems to have been the outcome of old routinized procedures, where should the historian begin his investigation regarding the possible sources of ruling? What does constitute a "context" for a case, especially as each one is represented as self-sufficient and heavily edited by the judge and his scribe? How is it possible to determine which "text" proved "relevant" for a ruling? Is it possible to speculate on the possibility that courts did not simply apply the law but also contributed in making it, in particular when faced by rigid laws and procedures that did not match the social needs of their own times, or the needs of a particular case?

Finally, the question of a possible hierarchy of cases, or that of "leading" cases. Again, as before, in the absence of the jurists' and judges' *own* evaluation of cases and with no *explicit* reference to any precedent (it is debatable whether precedent as a rule of law even implicitly existed), the historian is left with choices of his or her own making. The question is posed at its most obvious level when "referring" to or quoting *specific* cases: there were simply no standards for referring to cases or quoting them for that matter, and the historian is left with but an arbitrary choice of her own, which often amounts to a contemporary numbering of cases and their respective pages in registers. The *arbitrariness* of cases has therefore no easy solution, and, like the oblivious attitude that jurists maintained towards case analysis, contemporary scholarship cannot simply reconstruct and impose an order that was not there originally. The historian would thus like to create a niche for cases whose memory and impact never went beyond the judge's courtroom, and within a system that neither had precedent nor law reports nor judicial review. Also, his enterprise would have to accommodate such a neglect as part of the system of meanings that the judiciary created for itself. Laws were not manmade, and the bearers of law came within a hierarchy that determined their degree of creativity in interpreting the scriptures; and the courts were thus only a small part of a larger system, with no contribution at all in lawmaking.

To be sure, the anxiety that the law faces à propos the empirical nature of court cases and their eventual dismissal is not only common to systems that could be affiliated with the sacred, meaning all systems based on divine revelations and scriptural texts. Thus, for example, to compare with another case-law system—even though it shares no similarities with sharī'a law—English common law had all kinds of lawyers and scholars from Glanvill, to Bracton, and Blackstone, all of whom based their assessment of the common law on published law reports (or law cases). The reliance on cases, however, was also limited and never went beyond a certain point, namely, that of assuming that the system had an inherent logic of its own, and that cases did fit within that logic.[12] Indeed, it is that purely empirical dimension to cases that lawyers and scholars find disturbing. However tight the system might have been in allowing disputants the right to use their own language within the courts, cases manifest a dimension that is hard to swallow within the norms imposed by the system.

Significance of the general rules

The notion of "coherence," as represented by scholars, would like to project an image of the fiqh as locked within its past while successfully adapting itself to the needs of the times, while being faithful to its heritage (see Chapter 1). The problem, however, is that such internal representations, which modern scholars often adopt willy-nilly, fail to account for the priorities given to particular opinions at a specific historical juncture; and more important, it fails to explicate which legal doctrine prevails at a particular juncture since the assumption is that the body of *furū'* should always conform to the old established *uṣūl*.

We therefore need to posit a situation where legal doctrine is formulated for the specific needs of judicial decision making: for each historical period, there should be a corresponding set of reformulated idiomatic notions that would have adapted to the societal conditions of that period.

A possible beginning for such an enterprise would be the "general rules (*al-qawā'id al-kulliya*)" of the Ḥanafīs. Though it remains uncertain when such rules became operative, their history in Ottoman times is well known. In fact, their most complete formulation goes back to Ibn Nujaym (d. 970/1562), an early Ottoman Egyptian faqīh, who in his *al-Ashbāh wa-l-naẓā'ir* ("similarities") had compiled most of the rules that would be known to Ottoman

12. A.W. Brian Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995), 1-12.

scholars up to the Majalla. But their systematic compilation did not evolve much until the Majalla in 1877, also known as the Ottoman Civil Code, consecrated them as the first 99 rules in its voluminous text. But even though they were supposed to constitute the *uṣūl,* or "basic rules," for the other chapters, in particular those on contract, property, and adjudication, their order remains for the most part uncertain if not erratic, as if a first draft of an aborted enterprise, which pushed some modern scholars to bring more coherence into them.[13] The positive aspect, however, of the Majalla's enterprise was that it brought all such rules together and numbered them, and, to my knowledge, they have not been subjected to substantial additions since, even though several more have been suggested. The point here is that the "general rules" ought to be looked upon as a revival of the old *uṣūl* ("foundations") but in a more practical form that would ease judicial decision making by making personal *ijtihād* more accessible to a larger number of scholars. Ibn Nujaym, who perceived such rules as an "art or a technique (*fann*)" in itself, claimed that Abū Ḥanīfa had already mastered on his own seventeen of the rules, and that it was therefore "essential to know the rules that constitute the fiqh and through which all the *aḥkām* ("rulings") came into being, and which in reality are the *uṣūl al-fiqh,*" so that "from the application of such rules a faqīh achieves the level of *ijtihād,* even if he were only to draft a fatwā."[14]

Such accolades sustained these rules among Ḥanafīs, even though it remains uncertain how popular were those general rules were among scholars. In fact, the beauty and power of the general rules resided precisely in that they were applicable to both the *'ibādāt* ("religious rituals") and *mu'āmalāt* ("pecuniary transactions") without, however, giving any priority to one branch over another, and without subsuming the logic of one to the other. Thus, a rule could have application in any of the fiqh's numerous branches, or in only one. More importantly, the rules were not necessarily construed on general deontological principles that could serve as the basis for judicial opinion and decision making. The fact that some of these rules were neither based in religion nor in morality and ethics—at least not overtly so—even though they might have been germane in the *'ibādāt,* is an indication that the rules' basic aim was primarily pragmatic. In fact, the purpose was very visibly to bring the enterprise of the fiqh to a point where it could generate its own rules and thus ease the process of adjudication without going through the tedious task of interpreting layers upon layers of opinions, even though the scholars always assumed (and indeed, overtly stated) that they would have to complete all that

13. One of the most comprehensive is by Muṣtafa Aḥmad az- Zarqā', *al-Madkhal al-fiqhī al-'āmm*, 3 vols. (Damascus: Dār al-Fikr, 1967-68), vol. 2 for the "general rules."

14. Zayn ad-Dīn b. Ibrāhīm Ibn Nujaym, *al-Ashbāh wa-l-naẓā'ir* (Damascus: Dār al-Fikr, 1986), 10.

work for every act of *ijtihād.* But the appropriate knowledge of a specific rule, however, enabled a scholar to make a cogent guess as to what direction he ought to follow for his ruling.

One should therefore imagine the general rules in terms of a pedagogical enterprise, one that would help scholars towards an understanding of the long history of the fiqh and its ramifications through a logical organization of its main premises. Obviously, such an enterprise assumes—even though Ibn Nujaym remains silent on this—that the old *uṣūl,* as depicted in *ẓāhir al-riwāya,*[15] were no more convenient for bringing the vast heritage of the fiqh together, so that a sense of coherence was to be detected only if the fundamentals were entirely rethought. Hence such an enterprise, which came into being at the beginning of Ottoman rule as if to initiate a new understanding of Ḥanafī practice altogether, was intended to be primarily pragmatic while maintaining traditional coherence and roots with the past.

Consider, for example, Ibn Nujaym's first rule—all of which will be integrated in the introductory chapter of the Majalla, albeit in a different order—that "there is no reward but in intention (*lā thawāb illa bi-l-niyya*)." If the reward for an action is in the intention attributed to it by the subject, does that imply that an act of sale, a lease, or a contract, must all be based on the intentions of those involved? In fact, the pragmatism that lies at the foundations of the "general rules" crosses all the branches of the fiqh without, however, being limited to any of the "parts (*al-ṣuwar al-juz'iyya:* the fragmented images)."[16] Thus, a sale is independent of intention, and so is swearing to God, which is convened whether it is taken willfully, or in an absentmindedness, or wrongly, or even under duress.[17] On the other hand, while the various *'ibādāt,* from praying to fasting and paying the tax for the poor and needy, are all meaningless without the intention behind them, the act of judging, which Ibn Nujaym also includes among the *'ibādāt,* must be associated with intention. A judge must be aware why he is ruling in such and such a manner; and the same applies to all other rulers and government officials who need to be conscious of what their rulings, sanctions, and punishments imply. If swearing to God is independent of intention, however, oath-taking is also, since it cannot be dissociated from its purpose. Thus far, therefore, the *'ibādāt* are the only ones subject in toto to the rule of intention, and regarding other activities such as judgeship, it all depends on whether we would like to associate them with the *'ibādāt* or not.

15. On the foundational texts of the school, see *infra* Chapter 1.

16. Ibn Nujaym, *Ashbāh,* 4.

17. Ibn Nujaym, *Ashbāh,* 18-19.

On the other hand, for the most part, transactions among individuals are not subject to this rule, and, with the notable exceptions of oath-taking and homicides, most of the procedural cases in this study involving contractual settlements should not in principle be subject to the intention rule. But homicides are, because "they are related to the purpose of the killer in his killing." However, "whenever the purpose is linked to an inner behavior [*amr-an bāṭini-yyan*] the weapon used in the crime itself serves to detect intention [*uqīmat al-āla maqāmi-hi*]."[18] In other words, and as will become evident in the chapter on crime (Chapter 11), the nature and substance of the weapon used in the killing, whether it is wooden or a sharply edged metallic object or something more malleable, is what determines intention all by itself. So there was a consensus among scholars that sharply edged metallic objects cannot be that innocent whenever used against a human body, in particular if their use results in the death of the victim. In short, using such tools is an indication of a willful act of killing, which must be punished by death because it involves ending the life of a soul (*nafs*).

The general rule of intention could thus be applied to different domains while going through different interpretations. The arguments that the jurists had elaborated, say, for homicides, whether intentional or not, or committed by error or not, could not be applied to other domains since they were unique to that area alone, and were hence hard to be deductively reached from the general rule, which only tells us that an act of killing must be associated with intention. That, in turn, came in association with the fact that practically all the *'ibādāt* must be associated with intention: the general rules thus typically brought disparate things together, but that did not preclude, however, that specific rules might have been needed for each specific matter separately.

The set of rules that will be of most concern to us in this study are related to evidence, proof, and persuasion. A general rule states that "certainty is not eclipsed with doubt [*al-yaqīn lā yazūl bi-l-shakk*]" (Majalla, 4), out of which several other sub-rules are derived, one of which—"in essence things should be left as they were [*al-aṣl baqā' mā kān 'ala mā kān*]" (Majalla, 5)—determines a great deal of the procedural fictions that were in effect in the sharī'a courts. The idea here is to accept the perseverance (*istiṣḥāb*) of a situation (*ḥāla*) until proven otherwise. Suppose, for example, that a debtor claims to have paid his debt while his creditor denies such a claim. If the debtor cannot substantiate his claim, and the creditor takes oath, then the judge could rule in favor of the latter. But if the debtor substantiates his claim and furnishes evidence, then the judge would rule in his favor. Therefore, the debt, considered in Ḥanafī practice as the property (*milk*) of the debtor, remains in the latter's

18. Ibn Nujaym, *Ashbāh,* 20.

"consciousness (*dhimma*)" until proven otherwise. In actuality, many of the cases presented in this study assume that rule: a property is *ab initio* the *milk* of X unless proven otherwise. That could entail all kinds of procedural fictions that would consecrate a property transfer from one family member to another (Chapter 5).

Besides generating contractual settlements in lieu of genuine contracts of sale or hire, or property transfers among members of the same family, the general rules of evidence had a much wider scope since, surprisingly, they even contributed towards fictitious peaceful settlements among the victim's kin and the alleged culprit (Chapter 11). In that case, the victim's kin would claim that the defendant is the murderer, which the alleged culprit strongly denies. Once the plaintiff is summoned to furnish evidence, however, he claims he has none; but since the defendant had already denied all allegations, he could take oath as evidence, but he would rarely do so and prefer to wait for a ruling in his favor. (The option not to deny a criminal behavior under oath could be an indication that those culprits were after all involved in what they have been accused of. The purpose of procedural fictions, however, was precisely to find a way out—a contractual settlement—beneficial to both parties, without pushing anyone to lie under oath, which in this case, would obviously be the defendant.) The judge is therefore left with the only alternative to rule in favor of the defendant. Thus, in a strange way the plaintiff loses a case that he or she had initiated while the alleged culprit clears himself (no female defendants in homicides) from any wrongdoing. There are several things that the plaintiff might have received in return, assuming, of course, that he or she is not dumb enough to initiate a lawsuit without any shred of evidence, but one of them seems more rewarding than others: the plaintiff, who poses him(her)self as the victim's closest relative may have requested total control over the latter's inheritance, which was to be implicitly guaranteed through the procedures of each case.

In their essence (*fī al-aṣl*), therefore, individuals are free of any wrongdoing (Majalla, 8), and if accused of any offense, be it a debt they were unable to pay or a crime, they maintain their innocence until fresh evidence proves otherwise. A plaintiff-debtor may thus request from his defendant-creditor, if he is unable to furnish evidence of payment, to take oath for not having received the debt yet. In fact, the payment or non-payment of a debt, or a crime for that matter, are all looked upon as contingencies (*umūr ʻāriḍa*) which are not in the essence of things: "the essence of contingencies is their non-existence [*al-aṣl fī al-umūr al-ʻāriḍa al-ʻadam*]" (Majalla, 9). We only know for certain the existence of beings as they have always existed, so that a contingency is certainly doubtful unless proven otherwise; but oath-taking is the responsibility of the party that denied the contingency, such as denying

that a payment ever occurred. Which bring us, once more, to the crucial issue of evidence. Many of the procedural fictions, which were the work of the sharī'a courts in order to accommodate the proliferation of contractual forms, play around with evidence and its flexibility in Ḥanafī practice. Whenever contractual forms (or type-contracts) are limited and rigid—in the sense that they require quasi-"equal" and simultaneous exchange, and the exchange of things whose existence is certain (something that is yet to be produced is non-existent)—a way out was through fiction that would accommodate new formulas.

Proof is a strong term that implies adequately constructed evidence: "what is furnished as evidence shares a similar status to what is taken for granted by perception [*al-thābit bi-l-burhān ka-l-thābit bi-l-'ayān*]" (Majalla, 75). Proof (*burhān*) is therefore broader than evidence (*bayyina*), which turn is reduced to its fragments: thus, several pieces of evidence might lead to a convincingly articulated proof. Another general rule states that "while evidence is limited to the manifest in an external conflict, oath-taking is to maintain the essence of things [*al-bayyina li-ithbāt khilāf ẓāhir, wa-l-yamīn li-ibqā' al-aṣl*]" (Majalla, 77), which could be associated with the well known ḥadīth: "evidence is on the plaintiff, and oath-taking is on who denies" (Majalla, 76).[19] Thus, evidence and oath-taking are not necessarily associated with the same phenomena: every conflict is about things that allegedly and manifestly are not in harmony with one another, and unless the plaintiff furnishes evidence, everything goes back to its essence (*aṣl*). Oath-taking, only when no convincing evidence is furnished, maintains its oracular nature to keep up with the essence of things. Moreover, since acknowledgment (*iqrār*) is no evidence unless proven so, what amounts to evidence are either written documents or else oral testimonies through witnessing.

The procedural fictions that will preoccupy us in this study will conflate all elements of the system of proof and persuasion together, thus relying on witnessing in conjunction with oath-taking in order to produce contractual settlements that would have been unthinkable in classical Ḥanafism. The general rule therefore maintains that the plaintiff is the one to first initiate "the conflict of the external (*khilāf al-ẓāhir*)," and must accordingly furnish evidence, so he or she cannot testify upon oath because that procedure aims at keeping things as they were in their essence (*aṣl*), sheltered from any conflict. It is precisely the defendant who would like to keep up things in their essence, and his denial upon oath is approved as long as the plaintiff was unable to furnish evidence.

19. The second rule (76) should derive from the first (77) rather than the reverse: in many instances, the order of the Majalla needs to be revised to come up with a more meaningful coherence.

There are several other procedures that will be dealt with in detail once we reach their corresponding cases. The relevant question at this stage, however, is to see whether all those rules, and the opinions and procedures which apparently were derived from them, did push for any new formulations in terms of Ḥanafī legal doctrine and fundamental concepts such as custom, property, contract, and evidence. For one thing, it is generally assumed that Ḥanafīs were pretty flexible when it came to custom, thus allowing all kinds of practices to be acknowledged as law. A general rule has even become the norm since stated in Ibn Nujaym's *Ashbāh:* "Custom serves as the basis for adjudication [*al-ʻāda muḥakkama*]" (Majalla, 36), and to which several other related sub-rules are associated. Once the relevant texts are properly analyzed, however, the perception that emerges shall underscore a notion of custom as a leeway to emerging contractual settlements (Chapter 1). In actuality, what emerges from the sharīʻa courts is a situation where contractual forms, which in principle should not have been accepted, have been assimilated within the court procedures. Those were mostly related to types of contracts that either required a payment involving an assessment in kind from still nonexistent produce, which was the case of most sharecropping contracts (*musāqāt* and *muzāraʻa*); or contracts creating a de facto ownership from a waqf property in the form of a long lease and an investment known as the *marṣad;* or contracts transforming tenants to de facto owners of their leased properties because of the *khulū* and *gedik* requirements (cash sums to be paid in advance to the previous tenant for vacating the place, and that would in itself safeguard the new one from the limitations of short leases and the like) (Chapter 3); or contractual settlements transferring properties between members of the same family to make the transfer valid and non-revocable through a judge's ruling, and through the fiction of the hands-on and hands-off technique (*waḍʻ yad* and *rafʻ yad*) (Chapter 5); and, finally, last but not least, contractual settlements between the victim's kin and the alleged culprit, in which the latter receives full vindication in exchange for the plaintiff's control over the victim's succession and properties (Chapter 11). In addition to variations to which such contractual forms might have been subjected, there are still other yet to be discovered forms, but in their similarity they already indicate to a desire for type-contracts that did not limit individuals to rigid settlements.

The point here is that such contractual forms were indeed legitimized, and hence became quasi-legal, only on the basis that they were already acknowledged as custom, and hence integrated within the broader corpus of the fiqh under the general rules that accept custom as a basis of adjudication and law. But an analysis of the law of contract, based on the texts of the Ottoman period, only reveals a poor integration of all the contractual forms that emerged on a de facto basis with the classical notions of contract and

property (Chapter 3). In effect, notions of contractual settlements and property rights (the former granting the latter), rent and tax, were not reshaped so as to accommodate the needs of the mīrī and iltizām system, and as if to make things worse, that system fell totally outside the scope of the concept of property as developed among the late Ḥanafīs (Chapter 4). Thus, in one of the last major Ḥanafī manuals, a supplement to the *Radd* by the author's son,[20] and which goes back to the second half of the nineteenth century, Ibn ʿĀbidīn's son comments on a "question" to clarify the "meaning of property (*maʿna al-tamlīk*)." Not only did the son not budge from what his father had already stated, he only recalls notions of property that overall go back to the *ʿushr* and *kharāj* era (the classical Islamic taxes on land and its produce, see Chapter 4 *infra*). Beginning first with a reminder that property and donation are two different things in both ordinary language and law, Ibn ʿĀbidīn then digresses on what is legally eligible for *tamlīk.* The act of *tamlīk* is only possible for "uncultivated lands [*mawāt*], or lands owned by the sultan, or from anything that the sultan gives as a *muqāṭaʿa* [fiscal unit], and in which case he enjoys the right to cease property rights as already explained in the chapter on the *ʿushr* and *kharāj*."[21] But that is no different a concept from what Ibn Nujaym had already stated in his *Baḥr,*[22] when Egypt had just emerged from the Mamlūk era and Ottoman rule was still in its infancy. Besides the fact that the reiteration of old opinions raises serious questions on their historicity, there is no place here for what the *mīrī-iltizām* tax-farming system had created (not to mention its predecessor the *timār*), namely properties, which in the final analysis, had lost their established ownership status: in principle owned by the state—or the sultan—they became de facto "possessed" by the families or individuals to whom they were granted *iltizām* rights over long periods. Thus, the *Radd* states that an acknowledgment of ownership should in principle be granted to all those who have "occupied" and cultivated a land for a period of time, and whose status of ownership was either uncertain or "open." But that's not enough to clarify the ambiguous status of mīrī lands and the nature of the "rent" that was extracted from the peasantry in kind or cash.

The truth of the matter is that the Ḥanafī notion of custom is far less ambitious that what it might first seem. For one thing, the often quoted statements on the importance of custom in the *aḥkām* ("rulings") in general contributed to accepting all manner of customary practices without a well thought out plan for a conceptual integration. Moreover, despite all the new contractual forms

20. The last two volumes of Ibn ʿĀbidīn's *Radd,* vol. 7 & 8, are better known as *Ḥāshiyat qurrat ʿuyūn al-akhyār,* or *qurrat* for short. For a full reference and discussion of those works, see Chapter 1 *infra.*

21. Ibn ʿĀbidīn, *qurrat,* 8:498.

22. For a full reference and discussion of the *Baḥr,* see Chapter 8, in particular C 8-1 *infra.*

to which the sharīʿa courts had been accustomed, procedural fictions only helped in keeping the substance of the law fundamentally unaltered. By the second half of the nineteenth century, the sharīʿa system only survived as one of "communal" and private adjudication, as it did before but with growing restrictions, while the state rushed towards the Napoleonic Codes to legislate on public matters. What led to this downward turn of events was that Ḥanafī scholars looked at many of the practices that emerged throughout the Ottoman period—particularly in matters of contract and property—as incongruent with their own conceptions and beliefs, and they had to be accepted on a de facto basis so as not to make things even more difficult for the common people. This was done, however, without critical reexamination of the classical concepts in relation to those customary practices. In effect, the Ḥanafīs accepted their resignation to the realities imposed by the Ottoman state and its institutions via the doctrine of *al-maṣāliḥ al-mursala,* by which matters of public interest, the outcome of various state legislations, and which from the standpoint of the fiqh are neither forbidden nor recommended, could be accepted. They thus constituted a no man's land between the qānūn and the fiqh.

Organization of the book

Most of the fiqh material is based on the works of Ibn Nujaym, Ibn ʿĀbidīn, and the Majalla. Chapter 1 attempts to give a complete picture of the general epistemology of the late Ḥanafīs through a selection of Ibn ʿĀbidīn's writings, which point to the importance of language, tradition, and custom. Chapter 2 continues in a similar vein but with a focus on judgeship, adjudication, and the ethics of judges. The material on contracts in Chapter 3 constitutes the core of the book, considering that contractual settlements, either genuine or fictional, which play such an important role in many court rulings. The first two chapters are thus meant to sketch Ḥanafism as a total experience, one that brings together the foundations of the school under its representations of language, discourse, tradition, and customary norms, while in Chapter 3 contractual settlements are introduced in conjunction with all the major representations of Ḥanafism. This chapter also brings together many type-contracts, most of which were fictional, under a handful of notions that neither past scholars nor modern scholarship have looked upon as a totality. To accommodate such dispersed material, one needs to go back and forth between all kinds of texts, ranging from the fiqh manuals to the court records, and this chapter introduces our first cases, albeit our analysis is limited here to their contractual value. In Chapter 2 seven fictional type-contracts have been tabulated in Table 2-2; these will all be needed in the rest of the book, and the procedures will only become

comprehensible once the corresponding cases have been analyzed. Finally, Chapter 4 completes this first theoretical part with a reflection on property from key chapters and sections of Ibn ʻĀbidīn's *Radd.* The point here is to explicate the complexity of the procedures analyzed in the previous chapter by pointing to the fact that contractual settlements were what accommodated rigid property rights. Since property rights did not evolve much, it was left to procedures to rethink what contracts could accomplish.

Chapter 5 inaugurates the case-analysis technique, and does so with two cases that show how the transfer of properties operated, through fictional procedures, among family members of the Maronite Shihābī clan in nineteenth-century Mount Lebanon. Chapter 6 continues the same kind of task but with waqfs, and, again, through procedural fictions, waqf properties and their administration were validated through a judge's ruling in order to make them irrevocable. Both chapters point to several fictional procedures, such as the "debt," the unlawful hands-on ("occupation") and hands-off procedure, and the "three-founders" technique, all of which were very common at the time, as they opened ways to bypass limitations inherent in the Islamic law of inheritance, contract law, and the Ottoman property system. By contrast, the two cases in Chapter 7 were both genuine litigations, and the second one shows the effects of responsa through a detailed analysis of a muftī's fatwā that authorized the judge to go ahead with an *ex parte* ruling. Finally, Chapter 8 completes the hermeneutic circle of case-analysis by pushing the "legal" framework adopted thus far into other directions, namely, in terms of a perception of the "legal" through the lens of speech-act theory. In fact, the interpretation of cases cannot possibly conform to a single framework, which, at its most basic level, ought to concentrate on judicial decision making, and could be, pending the historian's own personal ambitions, be associated with other frameworks common to the social sciences, such as the linguistic and anthropological. How far can one go is a matter of personal evaluation and ambition.

The nature of judicial decision making in Ottoman societies would by and large remain incomplete if it were to be limited to the sharīʻa courts only, while leaving out other legislative and judicial instances. Chapter 9 provides a look at the adjudication of the regional council of Damascus during the early reforms of the 1840s, and my argument is that such judicial instances were not limited, as were the sharīʻa courts, to decision making, but transcended it into *policy*-making activities, as the concern here was mostly the status of state-owned lands, which the other courts hardly touched upon. Chapter 10 proceeds with this line of inquiry into an analysis of the nature of sultanic legislation. I was originally surprised to find in the court registers of Beirut either bilingual or monolingual sultanic firmans, all of which, even though nicely fitted within

the calligraphic structure of the registers, hardly made sense in terms of the practices of those courts. I argue that sultanic legislation was a parallel system to Ḥanafism, and for the most part followed its own syntax and grammar.

Finally, in Chapter 11, we come back to more sharī'a court cases, but this time of a "criminal" nature. The reader might, however, be disappointed to know that the purpose of such cases was precisely to point out to the court that the crime did not happen and that the culprit was innocent of any wrongdoing, and that—we're into more contractual settlements—the plaintiff who was kin-related to the victim should have the exclusive right to the latter's inheritance and properties. The end section of the chapter also includes additional cases from the Damascus regional council, hence its location at the end of this book.

I question in a short epilogue the possibilities for a law and economics sub-discipline in Middle Eastern studies. Overall, I feel more excited about the prospects of integrating "third-world" studies into the hegemonic western disciplines, as Max Weber did a century ago, than go through the dubious cycle of the "critique of orientalism." Needless to say, I remain pessimistic about such prospects.

The reader will probably notice that the present book assumes other studies still in progress. In fact, I've been working in the last ten years on a number of projects, which for the most part are linked to judicial decision making. Ideally, the present study should have begun with the early seventeenth century (very few registers are available of earlier periods) and proceeded forward, which is what I plan to do in subsequent research. Moreover, this book leaves in suspension the whole issue of the second era of judicial reforms, which began in the 1850s with the promulgation of new codes and the institutionalization in the 1860s of the newly designed *niẓāmī* courts. As far as Greater Syria is concerned, we enter virgin territory when it comes to the 1860s and their aftermath—up to the French Mandate—and undeniably this period deserves independent research of its own.

To my mind the most crucial issue remains the drastic changes that the judiciary had to go through in particular during the second era of reforms. The historian who has followed the evolution of both the juridical literature and judicial decision making over several centuries feels betrayed by the sudden shift in tone that occurred with the implementation of Napoleonic codes in the Ottoman Empire. Should such a transformation be looked upon as a major overhaul, one that rendered the practices that we've been discussing all along as ineffective, if not totally obsolete? Formally speaking, the system introduced in the 1860s signals a major shift, but that was only in the formulation of the law, which all by itself stands as very crucial. However, as I've argued all along, the practice of the law is what matters, which is the totality of the apparatus of justice. We therefore need to inquire,

regarding the transitional period from the 1860s up to the French Mandate in the 1920s, about the perception of all those newly promulgated codes and the process of their effective implementation, an approach that ought to be followed for the three decades of the Mandate. Then, by the late 1940s, right after independence, Syria and Lebanon had a new set of codes, but this time in Arabic, and also like their Ottoman predecessors of the previous century, they were a direct outcome of civil-law systems, mainly the French. For the most part, the codes in both countries are still fundamentally similar to what legislators and legalists drafted in the 1940s and 1950s. Yet, it would be very misleading to assume that the Ottoman system is done with once and for all on the basis that the whole apparatus of justice has been modernized, if not westernized. For one thing, traces of the Ottoman background are visible in both codes and practices, and the epistemic logic of the *ancien régime* could have well survived the hardships of the times.

In conjunction with the present study, I began in 1993 an anthropological research on the present-day Syrian court system, with a particular focus on criminal procedures. Because the archives in that system do not survive that long—three decades at most—I was thrown directly well into the 1980s and 1990s at a time I was still struggling with my Ottoman cases. Needless to say, there couldn't have been a more shocking difference. Criminal procedures nowadays are assumed by state institutions and follow an inquisitorial line of search for the truth until the culprit is found, so that there is nothing that resembles the sharī'a cases in Chapter 11. A more complete research, however, would look at the Ottoman penal qānūnnāme of 1858, which remained in force throughout the Mandate as the event that effectively triggered all change, and then describe how the newly designed courts effectively dealt with such a major transformation. An autopsy report, for example—as I came to discover from my own research—could follow all the medical requirements for that kind of expertise, and, at the same time, comply with social norms that refuse to look at a report in its objective facts only, which often leads doctors and medical examiners to moralize their findings (e.g., by adding to a report of a raped and then murdered teenage victim that she had been victimized because the moral values of the family and society have been degrading lately, and all this wouldn't have happened if parents were to take greater care of their children by enforcing stricter values). My point is that codes, procedures, and anything that the courts normally generate ought to be critically examined as part of the discursive practices of the justice apparatus as a whole, an approach that also focuses on a continuity with the past as "knowledge" within a society always survives with layers of the past, albeit selectively, and is the hardest to change.

A final word about how to effectively work with court records and other legal texts. Once the "case" as text becomes an essential methodological tool of one's démarche, regular note-taking in lengthy sessions in archive centers in Damascus and Beirut becomes ineffective and dangerously misleading: cases are too complicated to be treated in single sessions, and need full background legal work to be fully appreciated and contextualized. For that purpose, all cases in this book have been reproduced based on the original, and I therefore arranged to have permanent access to them, rereading them and revising my own interpretations whenever needed. Without the collaboration of all those who authorized me to photocopy or photograph the required documents, this study would have been impossible. I simply hope that the whole process of accessing documents and reproducing them in Syria and Lebanon receives its share of rationalization.

Chapter 1

The discursive origins of the fiqh in light of the mounting fiction of the madhhab

> "The *ʿālim* cannot teach [the common people] what to do [and what they ought to know from the sharīʿa] because he has no control over them. And even if they become aware [of the *ʿālim*'s knowledge], they would still practice what they got accustomed to do best and what they have learned from generation to generation" (Ibn ʿĀbidīn, *Rasāʾil*, 2:138).

> "Under certain conditions a "legal order" can remain unchanged while economic relations are undergoing a radical transformation" (Max Weber, *Economy and Society*, 1:333-4).

Beginnings

"The beginning of every science is difficult," complained Karl Marx in the celebrated preface to the first edition of *Kapital,* thus warning his reader beforehand on what to expect, especially as far as the "beginning" of "political economy" is concerned.[1] Beginnings tend to be forgotten in the modern age, in particular that contemporary education, whether in the arts or sciences, finds that the construction of a general discourse on the foundations of a science or art is a costly matter—and even costlier to transmit to students and scholars—and will never receive the endorsement it badly needs from the scientific community. Artistic and scientific communities of the modern age are constructed around invisible consensual discursive practices (or "grammars"), which are seldom questioned by the practitioners themselves, let alone by historians looking for an external point of reference for their

1. Karl Marx, *Le Capital* (Paris: Flammarion, 1969), 35: "Dans toutes les sciences le commencement est ardu."

narratives. But if the "beginning" (or foundations, or "*Grund,* ground" in Martin Heidegger's terminology) of a science, artistic field or professional activity eludes practitioners and enthusiasts alike, it is because such intellectual exercises, common in both medieval Islamdom and Christendom, and later in the formative period of modern Europe, are contemptuously looked upon as reminiscent of obsolete cultures whose foundations for knowledge are locked within the group that reproduced the canon. The modern age, being characterized by a (scientifically) competitive and open approach to knowledge, accepts at face value the Enlightenment epistemology of a knowing subject phenomenologically approaching its object through the lenses of the arts and sciences. Karl Marx must have been one of the latest in the grand tradition of western intellectuals to have questioned such foundations.

For an *'ilm* ("knowledge") like the fiqh, which is "knowledge" par excellence, its foundations are usually associated with the notion of *uṣūl al-fiqh,* which in turn is the (mostly written) work of the founders of each school (*madhhab*). But by the time the Ottomans had conquered Greater Syria and Egypt in 1516-17, the heritage of the fiqh was bulky enough to have discouraged even the brightest minds when it came to working from its *uṣūl.* For one thing, even though the *kutub al-uṣūl* have been well delimited and extensively interpreted among Ḥanafīs, time poses a challenging problem as it questions the *uṣūl* from a perspective of change. Moreover, since layers of *uṣūl* have been added to the original ones, it was up to the leading *fuqahā'* (jurists) to bring a new order into the picture. And so they did—with a vengeance. In effect, an organization of the foundations has to proceed not only through the original *uṣūl* and their various layers, but also through a score of compiled fatāwā manuals, sharī'a court records, sultanic legislation, and other parallel judicial instances such as the regional councils, not to mention all the literature produced by Ottoman officials, whether religious or secular. Considering the large number of textual sources, it is not to be expected therefore that one more reinterpretation of the *uṣūl* will give much of a guideline: the organization and interpretation in question will have to go through a much larger number of canonical texts than presumably assumed. Moreover, the canon had to be redefined so as to encompass texts whose circulation (*tawātur*) among the learned had left an impact.

The first unorthodox challenge was to come from an early Ottoman legal scholar (*faqīh*), Ibn Nujaym (d. 970/1562), who in his *al-Ashbāh wa-l-naẓā'ir* ("Similarities and theories") had constructed ground-breaking general rules for the Ḥanafī fiqh.[2] Those general rules, known as the *qawā'id kulliya,* are abstract enough as to cross the boundaries between the *'ibādāt* (religious rituals) and

2. Zayn ad-Dīn b. Ibrāhīm Ibn Nujaym, *al-Ashbāh wa-l-naẓā'ir* (Damascus: Dār al-Fikr, 1986).

the *mu'āmalāt* (pecuniary transactions). But their impact, despite all the praise that Ibn Nujaym eventually received from his peers, would have to wait for the Ottoman Majalla (1877), which was looked upon as the new civil code of the second Tanẓīmāt (even though the Majalla provided more of a refurbished law of contracts than a civil law per se). The committee behind the Majalla thought so highly of Ibn Nujaym's rules that it decided to include them all, add more rules, order and number them, and place them right at the beginning, in the first introductory chapter. Since the significance of those general rules will be expounded upon throughout this study, I am more interested to note for now that those rules were kept throughout the Ottoman period; scholars neither challenged their general character, their logic, nor their order. Needless to say, no new rules were created prior to the enterprise of the Majalla. The radical nature of Ibn Nujaym's enterprise might be partly to blame, as Ibn 'Ābidīn cautiously noted, that in spite of his predecessor's wide knowledge, it became unclear to later generations of scholars how those rules were linked to the *uṣūl,* and the later scholar was even suspicious about whether or not Ibn Nujaym had attempted to override aspects of the *uṣūl* (more on this later).

Compared to his predecessor, Ibn 'Ābidīn's enterprise in the "foundational" domain—which looks in hindsight modest and traditional, yet, coming as it does from the last major Ḥanafī faqīh and immediately before major legal upheavals—is definitely worth looking at. Ibn 'Ābidīn (1198/1783-1252/1836), who originally belonged to the Shāfi'ī school and only converted to Ḥanafism much later, is acknowledged to be the last major figure among the Ḥanafīs, and, as a result, his major work, the *Ḥāshiyat radd al-muḥtār,* remains to date the main reference in Sunnī courts (which now handle mostly personal status matters) in Greater Syria. Ibn 'Ābidīn's musings on where to begin and how to create an order in the long established Ḥanafī tradition come through on at least two occasions. The first is the "Muqaddima" to the *Radd,* which extensively demonstrates that the traditional hierarchies of scholars and their works (in addition to a few *rasā'il,* probably of a more systematic nature in that the main elements of *'ilm al-fiqh* are concisely stated), its orders and sub-orders, discursive practices, and ties to language and custom come more nicely tied together, thus giving the impression that those parts were probably drafted later than the Muqaddima. The Muqaddima, being a general introduction to a much larger work, is less structured, and addresses the crucial issue of organizing a material that vast and diffuse, and nested within layers upon layers of mussy interpretations, into something whose cogency is visible enough to both scholar and layman. But which parts were drafted first is only a matter of pure speculation since Ibn 'Ābidīn kept his three major works, the *Rasā'il, Tanqīḥ,* and the *Radd,* as a research-in-progress all his life, and since they were for the most part posthumously published, kept an open

organization that continuously integrated all the various *maṭlab*s ("requests"), cross-referencing them among one another and with the fatāwā in the *Tanqīḥ.*[3] The "requests" could be looked upon as case-law inquiries in a question-and-answer form, which may have been either based on real court cases, or else triggered by inquiries from scholars, muftīs, and judges, if not by Ibn ʿĀbidīn himself for the self-inflicted pleasure of solving difficult problems. In effect, the style between the "requests" and fatwās is suspiciously similar, in that both pose a problem, or at least come in the form of an urgent or not-so-urgent inquiry. But while fatwās are typically limited to such inquiries, whether real or fictitious, the "requests" were also generated by the large Ḥanafī literature, so that Ibn ʿĀbidīn would occasionally feel the urge to reply to a long-standing issue in the *madhhab,* one that would necessitate a digression due probably to a link to his own times. Obviously, the real danger is one of total fragmentation, in particular that Ibn ʿĀbidīn's approach lacks the daringly abstract rule-oriented approach of his predecessor Ibn Nujaym, and for this reason alone the Muqaddima ought to be looked upon with care, at least before one ventures into the eight-volume and 5,000-plus pages of densely packed text.

One of the last Damascene biographers of the Ottoman period, Muḥammad Jamīl al-Shaṭṭī, muses about Ibn ʿĀbidīn's reading of the *Durr al-mukhtār* by Ḥaṣkafī (d. 1088/1677), which in turn was a commentary on the *Tanwīr al-abṣār* by Timirtashī (d. 1004/1595), with a group of *'ulamā',* of which the most prominent was Shaykh Saʿīd al-Ḥalabī.[4] Prior to that Ibn ʿĀbidīn had studied with Shaykh Shākir al-ʿAqqād who had converted him to Ḥanafism, and with whom he went on to learn the basics. The point of honor in his distinguished career was definitely the dozen or so *ijāza*s (pl. *ijāzāt*), which were short memoranda that one would receive from a master on a particular topic, and which were an equivalent to modern college degrees. When Shaykh Ḥalabī died, Ibn ʿĀbidīn had to complete the reading of Ḥaṣfakī's *Durr* on his own, an effort that led to his own voluminous and unfinished commentary. The point of this short biographical notice (and biographies of the *'ulamā'* tend to be tediously short, secretive, and monotonously polite), was the juristic typology of the *madhhab,* which provided the faqīh with an order of things, and specifically, an order for the discursive layers within the school. The same order applied to muftīs and judges as well, which having been recruited for the most part within the same milieu, shared similar values. But even though all those functions did overlap—at least marginally in the trajectory of a minority of *'ālim*s (mostly in the venerable positions of judge,

3, Muḥammad Amīn Ibn ʿĀbidīn, *al-'Uqūd al-duriyya fi tanqīḥ al-fatāwā al-ḥāmidiyya,* 2 vol. (Cairo, 1278/1861).

4. Shaykh Muḥammad Jamīl al-Shaṭṭī, *A'yān Dimashq fi al-qarn al-thālith 'ashar wa-niṣf al-qarn ar-rābi' 'ashar, min 1201-1350 Hijri* (Damascus: Dār al-Bashā'ir, 1994), 252-5.

deputy-judge, and scribe)[5]—there was nevertheless a deep perception that the scholar faqīh was the most authoritative source of all, followed by the muftī, and then the judge. The reason is simple enough: *ijtihād* is the ability to exercise one's independent reasoning either on difficult matters, or on issues for which no clear opinion exists.[6] It doesn't make sense, noted Ibn ʻĀbidīn in his introduction to the *Radd,* to appoint a muftī who proves unable to exercise *ijtihād* on his own, while a judge could rely either on a scholar's or muftī's reasoning.[7]

Obviously, Ibn ʻĀbidīn was one of the latest Ḥanafī mujtahids, if not the most influential of the last two centuries. Apparently, drafting his *own* Muqaddima was no easy matter. I emphasize *own* as the style tends to get more personal with the Muqaddima and even more so with the *Rasā'il,* which represent the quintessential exercises in ijtihād. In between his Muqaddima and the *Rasā'il,* Ibn ʻĀbidīn was attempting nothing more than to plea for what Max Weber would have called a "legal order." The purpose was therefore to discover such an "order" and the grounds of "legal domination." In the context of Ḥanafī practice, the discovery of a "legal order" implies sorting out the discursive juristic typology within the vast fiqh literature. Such a structuring of discourse, however, is no easy matter as the legal practice cannot be limited to scholarly texts only. One needs to include, for example, the practice of muftīs, some of whom had their work compiled by disciples, or the judicial decision-making processes of the courts, whose "cases" were normally not the subject of compilation and scrutiny, not to mention the impact that customary practices had on canon law. Moreover, since Ḥanafism had become, since the military absolutism of the Mongols, a quasi-private law with little or no interference from the state, but which received the latter's formal approval,[8] the whole issue of the relationship between the fiqh and state law was expected

5. See *infra* Chapter 2, Table 2-1.

6. Sunnī ijtihād within the province of Damascus tended to be much more conservative and limited in its ambitions than its Shīʻī counterpart in Jabal ʻĀmil, which, being less tied to Ottoman control and the imperial center, reflected better the changing times and the socio-economic conditions of the region. Shīʻī *ijtihād,* being also far from the traditional centers of the production of Shīʻī *'ilm* between Najaf and Karbala, had developed its own *modus operandi* in terms of understanding the changes of the late Ottoman period. For a description of such intellectual movements, in conjunction with their socio-economic underpinnings, beginning with the end of the Ottoman era until the independence of the Lebanon, see Sabrina Mervin, *Un réformisme chiite* (Paris-Beirut-Damascus: KARTHALA-CERMOC-IFEAD, 2000), Chapter 3 on the culture of the *'ulamā'.*

7. See *infra* Chapter 2.

8, It was up to the Ottomans, who had adopted the military absolutism of the Mongols and Mamlūks to their own needs by excessively bureaucratizing it, that Ḥanafism became the official legal *madhhab.* However, it would be misleading to think of Ḥanafism under the Ottomans as "state law," or even as a quasi-"state law," since it essentially remained a privately protected and community-oriented system of transmission of normative values and of adjudication as well.

to be preponderant, for example, in the role of sultanic legislation, or in the specific functions of judicial instances such as the regional councils. As will be argued later, however, all such judicial or quasi-judicial institutions did not necessarily act in accordance with one another's jurisdictions, and, while not being antagonistic to one another, they nevertheless acted autonomously so that no higher centralizing judicial authority ever existed. That is why it is so difficult to discuss the Ottoman judiciary in terms of an apparatus of justice as such, since a "case" would have to find its way through *one* of the many judicial authorities pending on one's own strategies. Thus, for example, a Maronite confronted with a land-title dispute in Mount Lebanon would have been presented with a multiplicity of options ranging from the arbitration of the Maronite church itself, which had its own line of judges applying a combination of canon law and customary practice, not to mention their knowledge in the Ḥanafī fiqh; or the arbitration of the Ḥanafī courts of the neighboring cities such as Beirut or Damascus; or that of one of the notables, the *mashāyikh,* which as an alternative would have represented a shorter and more direct route, but whose costs might have been exorbitant. In short, when that many choices were presented, and when various judicial authorities were entrusted with different functions so that the in-between hierarchies remained formal, several discourses competed with one another rather than forming a coherent whole.

In fact, the issue at stake here, which the micro approach adopted in this study tackles through a juxtaposition of texts produced through different jurisdictions, is whether the fragmentation of the "legal order" would also imply a fragmented social order, or one whose rationality cannot achieve a higher level of coherence (in which the state institutions would have occupied a major role). In effect, since a legal order assumes a domination of some kind, that domination is established through the production of discursive practices that empower the jurisdiction in question and gives it the legitimacy it needs. Thus, the legal discourse found itself in competition with other discursive worlds such as the political, religious, and that of the ṣūfī orders, to name only the most preponderant, but none of which, however, assumed a leading societal role. In such a context, it was probably difficult for any discourse to assume a "public" role that gave the juridical discourse of the *fuqahā'* a "communal" role, one that protected the values of those urban communities in terms of their customs, religious values, and status-oriented contractual settlements and property rights, while avoiding larger public issues such as the role of the state, its bureaucracy, and the taxation system it imposed. Such juridical discourse established therefore what could be described, following Max Weber, a "modality of rule," a context of action that promoted particular discursive practices through a number of institutions mostly centered around

the sharī'a courts, though by no means limited to the latter.[9] I would like to argue that a notion of social authority as a modality of rule is precisely what stands behind Ibn 'Ābidīn's own discourse, which is particularly visible in his "introductory" statements, such as the Muqaddima and some of the *rasā'il,* but by no means limited to them. In fact, the social authority of an *'ālim* was a direct outcome of that same *'ulamā'* milieu that provided him with the education and skills he badly needed. But that authority, however, would have been in limbo were it not for the discursive activities that the *'ālim* found himself into and which he probably contributed in producing. Justice and morality notwithstanding, the juridical discourse aimed for *consistency,* which means that it had both to pursue consistency and achieve it. To be sure, what characterizes a legal discourse over the political and economic is such an ethos of consistency, which, in the case of sharī'a law meant harboring for a long time the *'ibādāt* with the *mu'āmalāt.*

The social authority of an *'ālim,* besides providing him with a specific role, was what gave meaning to the discourse in which he had to situate himself and contributed to its ordering and production. Empowered by an authority from his own *'ulamā'* group, that same group from which a number of scholars licensed him through the *ijāzāt* system, Ibn 'Ābidīn had to rethink the modality of rule for Ḥanafī practice, which implied the following: (1) determining all the texts that could have the status of the *original uṣūl* manuals (such as Shaybānī's six canonical treatises), as well as ones that could claim a similar status; (2) rethinking *ijtihād* in terms of the needs of one's own time, which implied a de facto look at custom; (3) reevaluating the muftī's function in terms of the ijtihād it required, and without which the *iftā'* would stand as meaningless; (4) reevaluating the traditional hierarchy of scholar, muftī, and judge, and precisely in that order, one that framed the madhhab in terms of the ijtihād that would bring all issues to bear on the contemporary needs of one's society;

9. See, for example, Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993), 32: "Legal domination may be seen more as the creation of a new context for action through the empowerment of a particular form of "creative imaginary reality"—legal discourse—as the modality of rule in a society." The point here is to perceive law not as something purely "instrumental," meaning a set of institutions whose sole purpose is to "adjust" to the preexisting economic order, and to play the role of an arbitrator for the latter. Thus, the notion of "modality of rule" grants the law a dynamic discursive role, which even though it overlaps with the economic order and its discourse (e.g., laissez-faire capitalism in the American republic), nevertheless maintains its own creative autonomy, and its own imaginative powers. Hence the necessity for a "legal domination," which is not to be identified with political or economic domination, even though it assumes both for its survival, but one whose authority it derives both through the "pursuit of consistency" and the "achievement of consistency" (Tomlins, 294). In other words, it is precisely that social authority as a modality of rule which provides the legal discourse the power to grant coherence to civil society, which neither politics nor laissez-faire economics can achieve on their own.

and, finally, (5) generally perceiving the madhhab as a discursive activity, one whose discourse had to be crafted in accordance with the authorities of the past and the interpretation of their works, in particular all those who had achieved that dubious status of *uṣūl.* Needless to say, such topoi were not peculiar to Ibn ʿĀbidīn, and if one were to historically assess his *opus,* the likelihood is that a radical approach of any kind could not have possibly materialized in such a milieu. His originality should therefore be looked upon in terms of the last *summa* to ever come from Ḥanafism.

The authority that the *ʿālim* inherits from his social status thus perseveres through the production of discourse within a modality of rule. It is the consistency that the legal discourse seeks that grants it a status in society that neither the political nor the economic can hope for. It was therefore the legal order, not the "market," that provided society with a constitutive order, and it was precisely the roots of the hermeneutics of Ḥanafī practice that Ibn ʿĀbidīn was attempting to reconstruct in his Muqaddima and *rasā'il.* Thus, a contractual settlement, for example, fits within a particular discourse produced by a legal order and through which it finds its meaning. There is, therefore, no "theoretical" versus a "practical" level as far as legal practice is concerned since all the spheres, such as property, contract, tort, and crime, which are normally considered as "the practice of the law" are themselves an integral part of the legal order, and which they contribute in shaping. Thus, as far as Ḥanafī practice is concerned, its discourse was the creation of the labor of scholars, muftīs, and judges alike, not to mention the practice of the courts, whose modalities would have been inconceivable without the broader domination of the apparatus of justice and its discursive strategies.

Social authority as a modality of rule would be inconceivable without a sense of juristic typology through which an *ʿālim* would find his place in society and his own madhhab, and Ibn ʿĀbidīn had to work out his genealogical affiliations in the "preface" to the *Radd,* situating it right before the venerable Muqaddima.[10] At one level, the "preface" looks like a well documented bibliographic essay, one that includes a pell-mell combination of authors, texts, and influential scholars, some of whom the author had the benefit of a close relation, such as the Shaykhs Saʿīd and Ibrāhīm al-Ḥalabī, by whom he was initiated into the reading and commenting upon the original *Radd al-muḥtār;*

10. Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāshiyat radd al-muḥtār ʿala ad-durr al-mukhtār: Sharḥ tanwīr al-abṣār fi fiqh madhhab al-imām Abī Ḥanīfa al-Nuʿmān*, 8 vols. (Mekka: al-Maktaba al-Tijāriyya, 1386/1966) will be referred to throughout this study as the *Radd,* followed by the volume and page numbers. There are several editions available of the *Radd,* including a recent one by Dār al-Fikr (Damascus), which has a much better typescript and fewer errors than the one I have been reading for years, but which, unfortunately, like all the other editions, lacks the critical apparatus needed to understand such a difficult text, such that all of them look no better than printed manuscripts.

and it was based upon those exercises of interpretation that his *Ḥāshiyat* grew as an independent work of ijtihād which gave Ibn ʿĀbidīn his long-standing fame and authority. There is no need at this stage to go through into all the names and authorities listed in the "preface," as we will come across some of their works as we find our way through the *Radd,* the fatwās, and the court cases. Moreover, the next section of this chapter, based on a reading of a couple of the *Rasā'il,* will look at the construction of authorial scholarship of some of the most influential Ḥanafī scholars through the lens of Ibn ʿĀbidīn's peculiar order, which *grosso modo* was that of the late Ḥanafīs.

This genealogical prolegomenon, which self-situated the author in his own madhhab, serve as a preamble to the Muqaddima, so that once the reader reaches the introduction, the text is already situated within and acts as a source of legitimation for the Ḥanafī madhhab.[11] In other words, the author creates a text through which he situates himself within his madhhab, and now that his authority has been self-proclaimed, he then proceeds with his introductory statements. The Muqaddima, argues our author, has to be looked upon both as an introduction to our knowledge of the fiqh (*muqaddimat al-ʿilm*), on the one hand, and as introductory digressions to the project of the book (*kitāb*) as a whole, on the other. How can one then reconcile the *ʿilm* with the *kitāb,* and what kind of conceptual unit do they form together? Ibn ʿĀbidīn played on the change of meaning that the same word can acquire once the vocalization on one of its letters is modified, so that *muqaddima* would become *maqaddama.* But the two words are indeed related, at least from his perspective, so that the Muqaddima ("introduction") is *muqaddama,* meaning it is something that "comes ahead" before anything else, and is not limited to texts. It thus used to be that the faction (*ṭā'ifa*) ahead of all others in the army was described as *muqaddama,* prior to identifying that adjective with all things "that come first." But the turning point was probably when *muqaddima* began to be associated with general terms that point to a "global concept (*mafhūm kullī*)" which might have been abstracted from "specific statements tied to a customary truth (*al-alfāẓ al-makhṣūṣa ḥaqīqa ʿurfiyya*)." As we shall see later in this chapter, the fiqh stumbled upon the division between a "local custom (*ʿurf khāṣṣ*)" and a "general (universal) custom (*ʿurf ʿāmm*)," which only a linguistic generalization could solve: How is it possible for a particular local custom to act as a source of law acknowledged as such by the fiqh? But if customary practices are reduced to their linguistic components—which is possible only if we assume that all *legally* valid customs must be in the form of utterances (rather than, say, an association of body gestures only)—the

11. The Muqaddima is located in the first volume of the *Radd,* 35-78. It is followed by "The book of purity (*kitāb al-ṭahāra*)."

next step would be to work out more abstract and general sets from those local components. This is precisely Ibn ʿĀbidīn's notion of what a book's Muqaddima ought to be all about, namely a combination of statements of a general nature whose purpose is "to be ahead" of what the book as a whole contains, and for which it serves as a general supportive framework. Beyond that, however, it remains unclear how one goes from the "specific"—which is always associated in the fiqh with a "customary truth (*ḥaqīqa ʿurfiyya*)"—to the more "general" and universal. We come here to the heart of the fiqh's problematic, the way concepts are linked together. First, the immediate reality of things, or their sensual perception, is given to us through custom. Such perceptive realities constitute "specifics (*khuṣūṣiyyāt*)," all of which are "true" because administered by custom. In short, any customary practice has to be accepted as such for its own sake, and it makes no sense to reject it: a custom only degrades and is forgotten through non-use.

Second, in order to proceed from the directly sensuous and the customary—or what is given to us in its immediacy—to the more abstract and general, a method of some kind needs to be created. That is a question that every philosophical system has to confront, and for which various systematic constructions have been elaborated for various cultural systems. It is well known that in the fiqh of the classical period, that of the founders, a methodology came into being in the form of the four rules of the Qur'ān, the sunna, analogy, and consensus. But even before the Ottomans' adoption of the Ḥanafī fiqh as their official law, the four rules were only formally stated as there was little that could still be retrieved from the combination of Qur'ān and sunna. On the other hand, the *uṣūl* of each madhhab were given priority, and it was a combination of inductive and deductive rules which enabled practitioners within the framework of a school to build a method of reasoning based on the *uṣūl*. Finally, the truth of the matter is that when it came to describing those methodological rules that enabled a particular school to persevere for centuries, the scholars were at best elusive, always hiding behind their statutory hierarchies. That is probably one of the major differences between a traditional mode of reasoning and one that is modern, namely that the latter cannot possibly rely on totemic figures of the past, such as the founders of a madhhab. To be sure, we'll have more to say on the *modus operandi* of the apparatus of justice in its totality, and on the *modus vivendi* of its coexisting (or conflicting) parts, but suffice to say, for the sake of this Muqaddima, that Ibn ʿĀbidīn will look much more conventional in his approach than someone like Ibn Nujaym who, a couple of centuries earlier, had aggressively sought abstract rules from his own erudition.

Ibn ʿĀbidīn's method was more organizational in nature than a rationalized abstractionism that would seek to generalize in order to create rules. It situated first the fiqh vis-à-vis the other sciences, then attempted to explain why the fiqh

should be given priority. Once such a privilege was granted, then the functions, divisions, and hierarchies of the fiqh would all to be clearly stated and elaborated. Even though the fiqh would find itself in competition with the other non-shar'ī sciences such as politics, philosophy, linguistics, history, ṣūfism, and algebra, it could not be placed in tandem with them. For one thing, the fiqh was considered the knowledge (or the science) of the *aḥkām,* which is the plural for *ḥukm,* considered as "God's discourse [*khiṭāb*] which addresses the actions [*af'āl*] of His believers".[12] Those divine regulations were in turn based on "indications (*dalā'il,* s. *dalīl*)" which served as "evidence" for the faqīh on how to proceed and construct more rules based on such *adilla.* The faqīh should therefore learn the "path towards evidence (*ṭarīq al-istidlāl*)" with the aim of constructing a fiqh that would act as "the knowledge of rules based on evidence (*'ilm al-aḥkām min dalā'ili-hā*)." The faqīh was therefore an interpreter of divine evidence, and through interpretation he would be able to create even more rules as a mujtahid. That is why the knowledge accorded by the prophet in his sunna was not part of the fiqh as such, because the prophetic tradition stands as "shar'ī evidence for normative rules (*dalīl shar'ī li-l-ḥukm*)," while the fiqh was based on that kind of evidence out of which more norms will be created.

But then not everything could be based on that kind of divine evidence, hence the decisive role of custom. Each customary practice was itself a datum whose role as evidence pointed to a certain truth (*al-ḥaqīqa tutrak bi-dalālat al-'āda*). In other words, a custom, in a way similar to a divine norm, was a *dalīl* (or *dalāla*) that would serve as "evidence" towards the reconstruction of a certain problematic of truth. Thus, every custom-as-datum could be used as the basis of prime inference out of which a ruling could be construed. For example, the utterances of a benefactor, either in a donation, a will, or a waqf, ought to be contextualized in relation to the linguistic norms of the community from which they have emanated, and without which they might become confusing, if not incomprehensible. Such a custom acted therefore as evidence of a primary truth (*ḥaqīqa aṣliyya*), or a self-evident truth which in its essence (*aṣl*) was simply given as a datum, and for which the divine norms, out of which the fiqh enterprise found its logic, did not serve as supportive evidence. In short, the enterprise of the fiqh was based on two sources of knowledge, one that is based on revelation and the interpretation of divine normative rules, while the other is encapsulated in (linguistic) custom and the self-evident truths that they generated.

It is the concomitant use of those two lines of normative rules, one divine and the other customary, which generates the discipline of the fiqh, a knowledge that aims at interpreting all kinds of normative indications (*adilla*) and creates

12. Ibn 'Ābidīn, *Radd,* 1:37.

an order by sorting them out and organizing them. The texts generated in such an enterprise are thus purely interpretive in their nature in that they all propose a *possible* line of interpretation—one among several other possibilities—hence the great diversity of the legal schools, and the even greater multiplicities of interpretations created within each school on its own. But in such a large hermeneutical enterprise, one that spans over a dozen centuries for each one of the schools, not all texts are obviously of the same caliber, and an ordering becomes more than beneficial. (1) First comes the *uṣūl* manuals, all of which based on the drafted opinions of the three Ḥanafī founders, and particularly on the six Shaybānī manuals collectively known as *ẓāhir al-riwāya* ("the manifest in the narration," or the authoritative doctrines). These texts are consensually agreed upon as being among the most reliable ("reliability" is always associated with the transmission of the texts, or the dubious process of *isnād*). (2) Next, the *nawādir* ("rarities," or the less authoritative doctrines), which though in principle are based on the *uṣūl* in (1), are nevertheless less reliable simply because the chains of their *isnād* make less sense, and because many are simply "attributed" to the founders without credible evidence. Some of these have been allegedly "dictated" by the founders to their students and disciples, and are hence also known as the *amālī* (s. *imlā',* dictation). In short, they can still be referred to but are nevertheless less authoritative. Finally, (3) the texts known as the *wāqi'āt* ("happenings") contain issues deduced through the process of *istinbāṭ* (a form of analogical reasoning through deduction) by late scholars, but for which, however, there is no equivalent original narration in (1).[13] Not only the bulk of the fatāwā would easily fit under that category, but, since customary practices are not rooted in the *uṣūl,* the process of "accommodating" them within the fiqh would also be assimilated within the *wāqi'āt* literature. That category of texts is definitely the broadest, and, being mostly based on the labor of independent mujtahids, is what updates the older texts to their contemporary connotations. That is definitely the case of the fatāwā, whether those that were inserted in the sharī'a records (see Chapter 7 *infra*) or those compiled by disciples and scholars who think highly of them. But even *shurūḥ* manuals like the *Radd* would also have that status.

The coherence of speech and the fiction of an unfolding madhhab

Ibn 'Ābidīn's second *risāla* comes as a surprise: "'Uqūd rasm al-muftī ["Chaplets on the muftī's task"],"[14] since the title is much narrower than

13. Ibn 'Ābidīn, *Radd,* 1:69.

14. I borrow the title's translation from the late Norman Calder's article on that same epistle, "The

its content.[15] In fact, the declared purpose of the epistle is to help all those involved in *iftā'* (described as muftīs and *'āmil*s, those in legal practice) in deciding between various opinions: how to sort them out, know the strong from the weak, and the reliable from the unreliable—in short, what could be described as *rasm al-muftī,* or all the signs and indications (*'alāma,* pl. *'alāmāt*) that point to the muftī his way for a just opinion.[16] The process of sorting out opinions and giving preferential treatment to one over the other is known as *tarjīḥ* (from the verb *rajjaḥa,* to surpass or give preference) and is common to all madhāhib; each legal school, however, fosters different *tarjīḥ* rules, which may vary from one period to another. The epistle therefore begins with the most commonly accepted Ḥanafī *tarjīḥ* rules, prior to reiterating the well known divisions between muqallids and mujtahids, then goes through all their sub-divisions, and digresses into the nature of custom and language and their interconnection (a necessary step since all opinions are based on prior knowledge of custom),[17] before concluding on what constitutes a genuine opinion. Thus, even though the second epistle does not add much to the notions of *'urf, 'āda,* and language (see the following section below), it is indeed the place to start, considering all the elements it brings together regarding speech and its place within the unfolding rules of the madhhab.

The first rule is obvious: practitioners of the fiqh should follow opinions approved by consensus and favored by their madhhab; when no consensus is available, adjudication based on a favored opinion (*al-iftā' bi-l-marjūḥ*) has its own rules, which muftīs and others should follow, except under special circumstances (a muftī informs about an adjudication while a judge is bound—obligated—by it). Muftīs cannot then adjudicate between two conflicting opinions without prior meditation (*naẓar*), and, following Qarāfī,[18] it is illegal to adjudicate without fully reflecting upon a prevalent opinion. Thus, three types of adjudication need to be avoided: (i) following one's inclinations and desires (*ittibā' al-hawa*), (ii) opposing a favored opinion (*marjūḥ*) to one that only seems probable (*rājiḥ*), and (iii) giving preference to an opinion

'Uqūd rasm al-muftī of Ibn 'Ābidīn," *Bulletin of the School of Oriental and African Studies* 63, no. 2 (2000): 215-28, which is the only study I know of on Ibn 'Ābidīn's work. Calder's emphasis on the poetry that is integrated within the textuality of the fiqh, and which tends to be ignored by modern scholars, is well placed.

15. On the content of Ibn 'Ābidīn's *rasā'il,* see Appendix 2. I will be exclusively referring to the facsimile Beirut edition, *Majmū'at rasā'il Ibn 'Ābidīn* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), which integrates two sets of *rasā'il* in one volume. Since each set has a different pagination, I will refer to them accordingly.

16. Ibn 'Ābidīn, *Radd,* 1:69.

17. On the influence of custom on judicial decision making, see the final section below.

18. Shihāb al-Dīn Aḥmad al-Qarāfī (d. 684/1285), Egyptian Mālikī faqīh, author of *Anwār al-burūq fī anwā' al-furūq.*

while its opposite has not been accorded enough consideration (*al-tarjīḥ bi-ghayr murajjaḥ fī al-mutaqābilāt*). In short, one needs to know well what the conflicting opinions are about, their history, which one dominates, which one is favored, and what is present-day consensus before exercising one's own independent judgment, while a muqallid would only follow a mujtahid's opinion, someone who completed all the above.

When sorting out conflicting opinions, knowledge of the "status"-as-class (*ṭabaqa,* pl. *ṭabaqāt,* or the bio-biographical literature) for *mujtahid*s is essential. There are seven classes of *fuqahā':* (1) the four founders of the four legal schools are at the top of the hierarchy since they established all the basic *uṣūl* rules; (2) they are followed by the founders of each school individually, such as Abū Yūsuf[19] and Shaybānī[20] for the Ḥanafīs, who work by deduction and analogy from the set of rules established by the one and only founder, and thus act as muqallids in the uṣūl and mujtahids in the furū' (meaning they can disagree with the founder in this area alone); (3) they are followed in turn by a class of mujtahids, such as Khaṣṣāf,[21] Sarakhsī,[22] and Qāḍīkhān,[23] who exercised their independent reasoning on issues avoided by the school's founder or his disciples, even though such jurists enjoyed no right in opposing the master in both furū' and uṣūl; (4) muqallids such as Abū Bakr al-Rāzī (better known as Jaṣṣāṣ)[24] who, even though weak in ijtihād, possessed wide enough knowledge in both uṣūl and furū' so as to have felt confident to state the two sides of an opinion that was either delivered by the founder or one of the disciples (an opinion is two sided if it considers both sides of a conflict, while a ruling deals with the possibility of two issues); (5) muqallids, among them Abū al-Ḥasan al-Qaddūrī,[25] known as *aṣḥāb al-takhrīj,* who derive the consequences and the facts of a case, then deduce from the source, and point to

19. Ya'qūb b. Ibrāhīm Abū Yūsuf al-Qāḍī (d. 182/798), one of the three founders of the Ḥanafī fiqh together with Abū Ḥanīfa and Shaybānī, and was the first to be appointed to the newly created position of chief-judge (*qāḍī al-quḍāt*) under Hārūn al-Rashīd; author of *al-Kharāj* (discussed below in Chapter 4).

20. Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804), one of the three founders of Ḥanafism with Abū Ḥanīfa and Abū Yūsuf, and author of the six basic *uṣūl* manuals (see below).

21. Aḥmad b. 'Umar al-Khaṣṣāf (d. 261/875), author of *Aḥkām al-awqāf* and the *Ḥiyal.*

22. Muḥammad b. Aḥmad al-Sarakhsī (d. 490/1097), major Ḥanafī faqīh and author of the influential *Mabsūṭ.*

23. Fakhr-l-Dīn Ḥasan al-Farghānī Qāḍīkhān (d. 592/1196), major Ḥanafī faqīh, author of *al-Fatāwā* and *Sharḥ adab al-qāḍī li-l-Khaṣṣāf.*

24. Abū Bakr al-Rāzī (d. 370/981), Ḥanafī faqīh and man of letters (*adīb*), who resisted the attempts of the caliph al-Muṭī' (r. 334-63/946-74) to appoint him chief judge. His work on Qur'anic law, which shows his Mu'tazilite side, is briefly discussed in Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2000), 334-38.

25. Abū al-Ḥasan Aḥmad al-Qaddūrī (d. 428/1037), leader of the Irāqī ḥanafites, author of *al-Mukhtaṣar fi-l-fiqh.*

others what should be followed and what ought to be avoided, and what leads to consensus; (6) muqallids who can distinguish between the weak and strong, reliable and unreliable, who are able to discern *mutūn* from *shurūḥ,* and whose contribution consists mainly in avoiding references in their manuals to weak and clumsy opinions; and (7) the last category of muqallids is also the worst: those who are unable to discern right from wrong and who should be avoided at all cost.

In a recent work Wael Hallaq has defined such a hierarchical categorization of authors and texts as a "juristic typology":

> A juristic typology is a form of discourse that reduces the community of legal specialists into manageable, formal categories, taking into consideration the entire historical and synchronic range of that community's juristic activities and functions. One of the fundamental characteristics of a typology is the elaboration of a structure of authority in which all the elements making up the typology are linked to each other, hierarchically or otherwise, by relationships of one type or another. The synchronic and diachronic ranges of a typology provide a synopsis of the constitutive elements operating within a historical legal tradition and within a living community of jurists. It also permits a panoramic view of the transmission of authority across types, of the limits on legal hermeneutics in each type, and of the sorts of relationships that are imposed by the interplay of authority and hermeneutics.[26]

According to Hallaq, it was the Ottoman Shaykh al-Islam Aḥmad Ibn Kamāl Pāshāzādeh (d. 940/1533) who apparently articulated the first Ḥanafī typology of jurists in which seven ranks (*ṭabaqāt*) are recognized,[27] and to which that of Ibn ʿĀbidīn was only a late (and probably the last) variant.

Such a juristic typology should be placed in conjunction with the enterprise of *tarjīḥ:* the higher we are in the hierarchy—the top three classes—the safer we are. Mujtahids are safer by definition; they also represent a much older generation than muqallids: those of the third category, who constitute the essence of Ḥanafī ijtihād, died between 261/875 (Khaṣṣāf) and 592/1196 (Qāḍīkhān), and the title of mujtahid does not even seem to apply to new contenders. It then becomes a matter of degree between the four remaining categories of muqallids, the fourth being the most reliable. But even a well thought out hierarchy cannot adequately solve the pressing issue of which manuals a muftī or judge should use when adjudicating. Moreover, assuming that most practitioners in the legal field tend to use the more updated works of later jurists, the place of the latter within all seven categories is uncertain:

26. Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 1.

27. Hallaq, *Authority,* 14-17.

prominent Mamlūk and Ottoman jurists such as Ibn al-Humām,[28] Ibn Nujaym, and Ramlī[29] are not associated with any category, thus the assessment of their work is itself a matter of ijtihād. Some of their works, such as Ḥaṣfakī's *Durr al-mukhtār* and Ibn Nujaym's *Ashbāh,* are even looked upon with great caution: "they are so concise and condensed that many of their statements are purely enigmatic; add to this that several statements and passages have been dropped in the act of copying [between manuscripts], thus encouraging preferences against [legally accepted] *tarjīḥ,* and even encouraging preferences predominant in other schools" (1:13).[30] False statements, opinions, and preferences were copied irresponsibly from one manual to another, thus prompting jurists into a delicate enterprise while sorting out confusing or false opinions. A case in point is the issue of fee payment for the recitation of the Qur'ān (*al-isti'jār 'ala talāwat al-Qur'ān*) which received a number of conflicting opinions. Some declared the *isti'jār* as legal, while others limited it to teaching the Qur'ān only, and others on pious deeds (*al-isti'jār 'ala al-ṭā'āt*)—all such opinions Ibn 'Ābidīn considered false. He in fact notes that the *ṭā'āt* opinion originated with the three founders who declared it illegal. But later generations of mujtahids reassessed the founders' opinion by declaring teaching the Qur'ān for a fee is legally valid for its necessity only (*li-l-ḍarūra*); some teachers were rewarded by the treasury, but then this practice stopped. The point here is deciding whether or not a fee should be paid is crucial because if it becomes invalid, then "both text and religion are lost" (2:14): somehow *iktisāb* in the name of religion tarnishes its image and purpose. Fee payment has even been extended by late jurists to the *ādhān* and *imāma,* their argument being that the three founders would have adjudicated the same way, had they lived in later periods. Thus, for generations, *mutūn, shurūḥ,* and fatāwā were drafted on accepting making a living from reading and teaching the Qur'ān, and what made things worse was that readings of the Qur'ān were usually performed with music, dance, and body rituals in the background.

The history of the fiqh is therefore filled with such anecdotal evidence where, according to the claim of few late jurists, the opinions of the founders have been grossly distorted in favor of more "realistic" ones. Ibn 'Ābidīn would himself have adopted a more realistic tone too, which he did in the second half of his *risāla* when he accepted some of those illegal practices on

28. Kamāl al-Dīn Muḥammad Ibn al-Humām (d. 861/1457), Egyptian Ḥanafī faqīh of the late Mamlūk period, whose legal fiction of the "death of the *kharāj*-payer," originally expounded in his *Fatḥ al-qadīr,* will have an enormous impact on the early Ottoman jurists such as Ibn Nujaym, see Chapter 4 *infra.*

29. Khayr al-Dīn al-Ramlī (d. 1081/1670), Ḥanafī faqīh from the Palestinian city of al-Ramlah, author of *al-Fatāwā al-khayriyya,* one of the major authorities in the *Radd.*

30. All in-text references in this section are from Ibn 'Ābidīn's *Rasā'il.*

the basis of their "customary" nature. Prior to such a decisive step, however, he would attempt another classification, but this time limited to the Ḥanafī fiqh only, one which adhered to the notion of "classes" or "generations [*ṭabaqāt*]," and, as noted earlier, only three come to mind. (i) The uṣūl of the Ḥanafī school is commonly referred to either as *ẓāhir al-riwāya* or *ẓāhir al-madhhab;* but even though the uṣūl is a common enterprise to the three founders, the notion of *ẓāhir al-riwāya* ("the literal meaning of an opinion") is only limited to the works of Shaybānī (six specifically):[31] they are labeled so simply "because they were told by Muḥammad [al-Shaybānī] in such a reliable way that they were either transmitted [*tawātur*] by him or well associated to his name" (1:16). The association of the uṣūl with Shaybānī is obviously related to his extensive coverage of many issues, at least much more than the other two founders. (ii) Rare issues not covered in any of Shaybānī's six manuals, but often in some of his others, do not fall within the first category: for one thing, having not emerged authoritatively from Shaybānī, they are thus less reliable; and having often originated from secondary works such as Abū Yūsuf's *Amālī,* that is, a work of "dictation [*imlā'*]" where the master opens up to his students on a number of issues that they "copy," then having been assembled as utterances into a book form known as *amālī* (pl. *imlā'*), but without having the work revised by their teacher, all such factors combined to make the case against the reliability of those texts. In other words, the issue raised here is one of "authorship": who was the real "author" in this case—teacher or students?, a strange question indeed considering that even in works attributed to a single author, he would typically conceal himself in the third-person of *qāla* and *ḥaddatha-nā.* This form of writing, in combination with *isnād,* detaches the subject-author from the text while granting it with an aura of independence from the person who produced it. Thus, the first category of *ẓāhir* consists of six manuals attributed to a single author, Shaybānī, but they have also been objectified because of the authoritative *isnād* links and *tawātur* that made them possible. On the other hand, texts of the second category were less authoritative because the text was produced by a multitude of persons/students while the real author allegedly dictated. Thus, such texts did have an author, but they were nevertheless unreliable because unchecked and untrustworthy opinions could have been added. (iii) The final and third category of texts is also the largest since it includes all issues deduced from the *uṣūl* works in (i), and over which they were either unclear or silent, and then collected in *shurūḥ* and fatāwā manuals. The point here is that in this vast body of works, texts should be always confronted with the reliable six *ẓāhir*s. Ibn ʻĀbidīn

31. *al-Mabsūṭ, al-Jāmiʻ al-ṣaghīr, al-Jāmiʻ al-kabīr, al-Siyar al-kabīr, al-Siyar al-ṣaghīr,* and *al-Ziyādāt.*

rejects any distinction between *uṣūl* and *ẓāhir al-riwāya* as unnecessary: there is no need to look at any uṣūl beyond the ẓāhir because the latter includes all possible uṣūl. Such a claim is defended by means of digressions regarding Shaybānī's method of work, and the only other authoritative work that stands out in comparison to Shaybānī's six is Sarakhsī's *Mabsūṭ*.

The two hierarchical *ṭabaqāt* sets, however, even when looked upon in conjunction with one another, provide no more than a rough and idealized sketch for judicial decision making. Considering that differences in opinion among the three founders were common, even the *ẓāhir* category, covering the uṣūl, places jurists head on with serious uncertainties. Opinions become even more uncertain when no word has been uttered by any of the founders on the related issue, and very recent ones are probably the most problematic in this respect. But, overall, what preoccupies jurists is less the silence of the law than already stated and well documented conflicting opinions emanating from prestigious sources (such as Shaybānī's six manuals and Sarakhsī's *Mabsūṭ*). Judges and muftīs can always pull out a favorable opinion from the large body of authoritative manuals, but it all boils down to the network of power relations that into which mujtahids find themselves embroiled a particular time: what in fact determines the authoritativeness of an opinion is more its acceptance within a network of disciples than its ability to persuade. It is to be expected therefore that practitioners of the fiqh will have to fight one another on the most essential aspect of an opinion—its authority. But no rules are to be expected here since a "rule" is no more than an opinion, stated by a mujtahid situated in turn within a network of networks, and attempting to impose his own discursive hierarchy. Thus, the labor of the fuqahā' is more to be perceived within than between the seven *ṭabaqāt*. In other words, late mujtahids will neither challenge the founders' opinions nor those of early mujtahids, but their focus will not be limited to scholars of their own generation: their attention will rather span over what they will perceive as an influential period, then using the earlier period of the founders as a reference point for their arguments.

A common problem is the conflicting opinions among reliable and authoritative scholars: those could be of different generations, and hence conflicts show up among mujtahids; they could also be localized within the opus of a single scholar—even the founders do not escape from such inconsistencies. Since two contradictory opinions from a mujtahid on a single issue could render them both invalid, it should first be checked which of the two came last: that in itself would constitute an indication that the second opinion was a *rujū'* from the first; but other scenarios are also possible: the unreliability of transmitters who could not distinguish between two opinions of the same mujtahid (or founder), one establishing a firm view of the matter while the other was much more cautious. Thus, cautiousness and certainty open

up for contextualization—Why were there two different opinions by the same mujtahid on a single issue?—since transmitters seldom do care about placing statements in their contexts. The fiqh literature itself is full of syntactic rules which in themselves already constitute indications towards contextualization. Thus, for example, "Abū Ḥanīfa said so" and "it was reported that Abū Ḥanīfa said so" are two different statements with different implications, the second being less certain since it holds the status of an "allegation." But even though linguistic indications are randomly provided to mujtahids, a decision must be made when two conflicting opinions show up. This is particularly embarrassing when the two opinions allegedly emanated from the same mujtahid (or one of the founders). In short, whatever the cause of the conflict, be it from the "source [*maṣdar*]" itself or from the chain of transmission, the mujtahid has no other choice but to practice *tarjīḥ. Tarjīḥ* is a much stronger form of *ijtihād* than *iḥtiyāṭ,* precaution, because the latter only involves a mild preference of an opinion over another (it could be either way—both sources are reliable—but it would be preferable to go that way), while *tarjīḥ* is more decisive because it declares one of the opinions as false and invalid. *Tarjīḥ,* however, comes as a last resort after applying the Qur'ān, sunna, companions, and analogy. Thus, *tarjīḥ* is a last resort to *ijmā'* without which no consensus is possible. But even though Ibn 'Ābidīn sides with Qarāfī on the necessity of limiting oneself to a single opinion in both *iftā'* and rulings, he acknowledges that this might be an impossibility under some circumstances. Mujtahids, for a variety of reasons (such as the lack of adequate information, or the impossibility in deciding between two equally valid opinions), might feel compelled to not favor an opinion over another (1:22).

The issue of fee payment for reciting or teaching the Qur'ān can now be looked upon in light of *tarjīḥ,* but its importance, as an example on how to deal with opinions that conflict with uṣūl, goes beyond what has been advanced thus far. In fact, the *isti'jār* line of conflicting opinions will serve as an example as to how an opinion would be tempered with local customs:

> Those whose opinions [regarding teaching the Qur'ān] are in conflict with their great imām [Abū Ḥanīfa] are not necessarily against their school if those opinions were favored by authoritative jurists [*rajjaḥa-hu al-mashāyikh al-mu'tabar-ūn*], or were based on customary practices created by changing times, necessity, and the like. (1:25)

Even though such arguments will be brought more forcefully in Ibn 'Ābidīn's *risāla* on custom,[32] its importance in this context stems from the fact that it connects so well with his arguments on *uṣūl.* The irony is that,

32. See the following section on "customary law."

having first established what the foundations of the school are, and the fact that all opinions—past, present, and future—should be tied to Shaybānī's six manuals, the *risāla* takes a sudden and unexpected turn by placing all conflicting opinions, and opinions in conflict with the *uṣūl,* at the mercy of customary practices. But even though Ibn ʿĀbidīn looks upon custom as a *fait accompli,* or more precisely, as a datum with its self-generating referents of truth-value (*al-ḥaqīqa tutrak bi-dalālat al-ʿāda*),[33] it does not therefore stand within the *maṣāliḥ mursalah,* a body of practices accepted for a certain period, and which are neither prohibited nor recommended. Those were in fact associated with broad imperial policies, though by no means limited to them, which were usually of a bureaucratic nature and covering fiscal matters. Thus, the *mīrī-iltizām* system was also looked upon as a *fait accompli,* but in a way very different from customary practices: it was, indeed, corruption per se (more about this in the following section).

Moreover, an acknowledgment of custom will bring to the fiqh a set of practices which it has thus far had a hard time accepting—mainly related to "unequal contracts"—then try to accommodate them, even though they would fit within the general history of the discipline at great pains.[34] But, more important, the acceptance of custom will not be complete without its discursive integration into the domain of the fiqh: in other words, an oral customary practice will undergo a process of translation prior to becoming a discursive practice. To be sure, customs in their original oral form are made up, at least in part, of linguistic components, but they could hardly be referred to as discursive at that stage. In fact, if discourse is to be limited to a *systematic* set of statements on a specific object, even though it might be far from coherent, then customary practices cannot be discursive in spite of their strong linguistic components. Their punctual, piecemeal, and step-by-step nature considerably limits their possibility for discourse. However, even if convincing arguments are laid out in favor of the discursive nature of oral customary practices, they would anyhow have to undergo some alterations in the process of integration within the fiqh literature. In other words, the fiqh does acknowledge a few customary practices but it cannot accept them in their crude and native state: once integrated in the fiqh literature, their discursivity is greatly transformed in order to fit within the (narrower) fiqh's horizon.

In spite of *ẓāhir al-riwāya,* which establishes Shaybānī's six manuals as the basis of *uṣūl,* there is no easy way to decide between conflicting opinions of the founders and their companions. One of the many "rules" states that if the conflict is between Abū Ḥanīfa and one of his two companions versus the

33. Ibn ʿĀbidīn, *Radd,* 1:37.

34. See *infra* Chapter 3 on contracts and obligations.

other companion, then the opinion of the first two is favored; but Abū Ḥanīfa versus his two companions creates a more complex problem "depending on whether their disagreement is one of an era and time period [*ikhtilāf ʻaṣr wa-zamān*] or on a ruling based on the essence of law [*al-qaḍā' bi-ẓāhir al-ʻadāla*]. [A mujtahid] would favor the two companions' opinion because the conditions people live in [*aḥwāl al-nās*] have changed. In matters such as sharecropping [*muzāraʻa*] and contract [*muʻāmala*] their opinion is favored because late jurists accepted them by consensus. In other matters, a muftī mujtahid is left to decide on his own" (1:27). Abū Ḥanīfa's opinions are dropped, on some crucial issues, because they are out of touch with current times, and mujtahids are advised to rule in favor of *ẓāhir al-ʻadāla,* which is not a perfectly clear notion yet, but probably implies ruling while taking into consideration the specific conditions of an era and locality; later in the *risāla,* the *ẓāhir* will be tied more forcefully to custom and the lengthy statement; "the conditions people live in," will be referred to purely and simply as custom. But notwithstanding Abū Ḥanīfa's (or his companions') opinions, mujtahids are left with a great deal of leverage, and such a "freedom" would have been unthinkable without the path to custom. Such drifts, however, from what the founders (or their companions) had preached, is not perceived as "walking away [*khurūj*]" from the madhhab: in fact, *ikhtilāf* is not a necessarily pejorative enterprise, and, in conjunction of a notion of "change" related to the fiqh, disagreements are indeed perceived as a necessary but helpful evil: "not every sound opinion [*ṣaḥīḥ*] is a valid fatwā since the valid in itself is not necessarily subject to a fatwā: considering that things change in time and out of necessity, there might be better opinions [*awfaq*]" (1:38).

The ground is now ripe to accept the necessity—at times—not to follow the *uṣūl,* and the relative freedom granted to mujtahids, thanks to custom. To be sure, the fiqh always granted some leeway to custom, but a turn occurred at the beginning of the Ottoman period when Ibn Nujaym established in his *Ashbāh,* and as an integral part of his "general rules [*al-qawāʻid al-kulliya*]," that "custom [habit] serves as basis for ruling [*al-ʻāda muḥakkama*]." His most well-known example was regarding the practice of *khulū* in Cairo: he thus made the point that since tenants had to pay large deposits prior to renting their homes or shops—a practice forbidden in the fiqh—such a custom, had it been declared illegal by sharīʻa law, would have ruined the majority of tenants.[35] It therefore had to be accepted as a de facto standard. Such strong views remained vigorous enough for Ibn ʻĀbidīn to state that "what is established by custom shares the status of the Text [*al-thābit bi-l-ʻurf ka-l-thābit bi-l-naṣṣ*]" (1:43), even though he does no more but reiterate

35. On the practice of *khulū,* see infra Chapter 3 on contracts.

upon a discursive practice inaugurated by his predecessor. The statement itself remains remarkable in that it places *'urf* and *naṣṣ* on the same footing, prior to the 'urf itself metamorphosing into naṣṣ once integrated into the textuality of the fiqh. But even more radical statements are yet to come: "You should know that habit and custom have become referential on so many issues to the point that they have achieved the status of *uṣūl*" (1:44). Custom achieving the status of uṣūl? This is not surprising since custom is the only practice that could impose itself on a well established uṣūl rule and override it:

> Considering that custom changes in time, what if a new custom has no equivalent in another time, should a muftī bypass the text and follow the new custom? I reply positively, because late jurists who did not follow the naṣṣ on some issues did so only because a new custom came into being after the imām's era. The muftī should therefore follow his new custom based on customary statements [*alfāẓ 'urfiyya*]. The same applies to a mujtahid's rulings who had to follow the custom of his own time, but then his custom changed to something else (1:45).

Having first acknowledged the importance of custom in judicial decision making, then, provided it a similar status to uṣūl, the third step would be to associate custom with language. In effect, customary practices, from the fiqh's standpoint, *are* exclusively linguistic statements described as "customary statements [*alfāẓ 'urfiyya*]." This implies that a customary practice does reduce, from a juridical point of view, to its linguistic components, to the point that had such *alfāẓ 'urfiyya* not existed, then they would have been impossible to account for. To be sure, many customary practices have non-linguistic components—e.g., bodily signs—which are the subject of anthropological research; such components, however, cannot be used in any legal enterprise such as a court ruling, muftī's fatwā, or a mujtahid's opinion.

The interest in the linguistic component of custom is not that surprising considering that the fiqh protects itself in discourse and its indefinite and deadly repetition: (1) the foundations of the fiqh, the *uṣūl,* are looked upon as consisting of the statements (including utterances) and meanings (*alfāẓ wa-ma'ānī*) of the founders; (2) for later generations of mujtahids, the rules deduced from the uṣūl are in turn linguistic (discursive) in nature, also consisting of statements, utterances, and meanings; (3) the fiqh is more interested in the *ẓāhir* over the *bāṭin,* that is, in statements as *explicitly* stated rather than in their intrinsic meaning or the subjective intentions and motivations of the social actors; (4) the fiqh looks upon statements and utterances outside its own domain—such as utterances coming from disputants in court, and customary practices, with the same logic as its own enterprise; (5) the process of *tarjīḥ* is one of interpretation in which texts are contextualized first with respect to the author's time, and then based on the mujtahid's own preoccupations

and period; (6) *tarjīḥ* therefore implies full knowledge of customary practices since they represent a fundamental element of change in any process of adjudication; (7) like the uṣūl and the fiqh in general, customs are made up of statements and utterances, and are subject to the same linguistic rules; (8) only the extrinsic meaning of a statement or utterance (*ẓāhir al-ma'na*) stands to be legally valid, while purpose or intention (*gharaḍ/aghrāḍ*) cannot be accounted for; (9) in sum, the process amounts into knowing the fundamental rules of uṣūl first, then checking whether those were respected by later generations of mujtahids, and finally, by means of *tarjīḥ,* deciding on an opinion in the context of present-day custom. The interpretive (hermeneutical) process, which permanently reordered Ḥanafī practice, was therefore linguistic in nature and also paralleled the epistemology of the sharī'a courts when it came to objective evidence, since both endorsed the *ẓāhir al-ma'na* as a safe bet.

What therefore pushed for a successful contextualization, in a process that initially was meant to bypass historical change altogether, was custom. Only customary practices pushed the fiqh to acknowledge changes that time imposed. This raised several questions: (i) How was change perceived? Was it socio-historical, linguistic, etc.?; (ii) Leaving custom aside, what kind of change did the hermeneutics of *tarjīḥ* assume? In other words, how did a mujtahid account for conflicting opinions: Was it only an outcome of custom?

The broadest rule regarding utterances relative to their corresponding custom could be stated as follows: "Our Ḥanafī imāms have asserted in their manuals that oaths [*aymān*] in our school are based on utterances [*alfāẓ*] rather than on purposes [*aghrāḍ:* meanings]. They've also stated that an oath is based on custom" (1:270). In short, an oath ought to be contextualized within the specific custom that produced it and made it possible; such a step was meant to be practical in that courts had to look for indications of the truthfulness of an oath not inherently in terms of its content—that would push the whole issue of meaning back to the surface—but to the objective implications of oath-taking procedures, all of which followed localized customs and hence were considered "genuine" within that contextual evidence. Needless to say, what applied to oath-taking was also applicable to witnessing, drafting wills and contracts, or any activity in which the use of language reflected custom as a major referent, which was the objective evidence that scholars, muftīs, and judges were all looking for. (The procedural fictions, which we will be discussing at length, were also meant to provide for an "objective evidence" in the bargaining process that resulted from the fictitious "litigation." Similarly, the intention of a culprit accused of homicide was discovered thanks to the "tool of the killing" itself rather than through subjective intent.)

Utterances, which are then always situated within a hermeneutical process, could be of different kinds beginning with the sayings of the founders, of

generations of mujtahids, and also of ordinary people in their daily lives. Regarding contracts, witnessing, and all activities in which the use of language is unavoidable, Ḥanafī doctrine dissociates the linguistic components of an utterance from its purpose. Thus, an oath-utterance of the kind "I'm not going to hit my slave with a stick anymore," is literally taken, so that if the utterer did hit his slave but with his fist, his action would not be looked upon as a negation of his utterance, even though it is obvious that the purpose is not to hit the slave. Hence, if the utterance was stated under oath in court, the act that followed would not have been considered illegal. The separation between utterances and their purpose (intent) limits judicial decision making to the explicit meaning of statements, and custom intervenes only as a linguistic tool of contextualization since it helps in informing on the explicit meaning relative to a locality at a particular time. In other words, custom does not help in pointing to the meaning of individual actions and their purpose, but only to the general meaning of an utterance. Thus, serving primarily as a linguistic tool of contextualization, custom only helps in *recognizing* a social practice that the fiqh would have otherwise rejected as contrary to its principles. In fact, even customary practices that were introduced on the basis of their economic necessity—such as the *khulū, marṣad,* sharecropping, and, more generally, contractual forms in which the value of exchange has yet to be determined—are reduced in the fiqh to their contractual and linguistic components. In short, a social practice only exists if associated with language: "there is no violation of an oath without an utterance [*lā ḥinth bi-lā lafẓ*]" (1:270), which, paraphrasing Descartes, could be stated as "there is an utterance, therefore a custom exists."

Having established the primacy of the literal meaning of language in legal matters—"only utterances are taken into consideration, but not their purpose" (1:275)—the problem becomes one of connecting utterances to their specific meanings—a process of contextualization referred to as *takhṣīṣ* where "the general would be made specific and tied to custom" (1:276). Besides its technical linguistic aspect, *takhṣīṣ* is a parallel heuristic device to *tarjīḥ* since it enables broad statements, established either in the uṣūl or through generations of mujtahids, to apply to specific cases. The hermeneutic process as a whole is thus intimately tied up to both language and custom, together forming "a customary linguistic truth [*ḥaqīqa 'urfiyya lughawiyya*]" (1:277), simply because each utterance "needs to be made specific by custom: this is a priority because it reflects the will of all the people" (1:276)—"truth [*ḥaqīqa*]" is here taken as what is opposed to a metaphorical meaning of utterances (*majāz*), that is, a statement at its face value. The "will of the people [*irādat jamī' al-nās*]" is what provides custom with the power to impose itself in every juridical and adjudicative act, and gives each utterance the ability to

manifest itself alongside the law: thus, for example, "the texts drafted by the founder of a waqf [among others] have the status of the text of the legislator" (1:277)—"text" is here *any* text, whether oral, written, or a combination of both, and clearly such assertions would have been unthinkable without the power attributed to custom in the first place.

The dissociation between custom and utterances on the one hand, and meaning on the other, seems in direct conflict with the first general rule established by Ibn Nujaym: "no reward without intention [*lā thawāb illā bi-l-niyya*]."[36] If reward, either in the world itself or in the afterworld, is inseparable from intention, then why are statements and customs—customs *are* statements—based on their explicit—manifest—meaning? If every action and statement finds its meaning in intention (*niyya*), then the manifest can only be what shines at the surface and needs to be connected with intention that lies deep beneath. However, the general rule does not connect every practice with intention. To simplify, only the *'ibādāt* are assessed in terms of the intention that motivated them, while the *mu'āmalāt,* including contracts, are not. The two categories ought therefore to be assessed each on its own, without the need, however, to be analytically separated.

A known ḥadīth states that "all actions are assessed in terms of their intentions [*innamā al-a'māl bi-l-niyyāt*]," the fiqh, however, leans more towards "assessing actions [*ḥukm al-a'māl*]." Assessment implies no more than breaking down "actions" into those that should be practiced with a declared intention in conformity to sharī'a law, and those practiced with no intention. In this respect, the broad division between *'ibādāt* and *mu'āmalāt* only serves as a general guideline since intention is not linked to all former practices, while some of the latter require a manifest purpose. Thus, intention is a requirement in praying, *zakāt,* fasting, and Ḥajj, but not in ablution, cleaning, or washing, even though the latter all are an intrinsic part of the *'ibādāt.* Similarly, conversion to Islam does not formally require intention because "a forced Islam is valid [*al-Islām al-mukrah ṣaḥīḥ*]."[37] Without going into all judgments regarding the *'ibādāt,* suffice it to say that Ḥanafī practice generally requires intent as a normative rule, but avoids doing so either when the practices are a necessary requirement for other ones (ablution is a requirement for prayer, washing a dead body is a requirement for burial), or when they are the outcome of war and conquest (conversion to Islam by force).

What does a *niyya* entail? Usually, no more than a *declaration* of intent of the form "I intend to pray [*anwī al-ṣalāt*]," which could be either stated aloud

36. Ibn Nujaym, *al-Ashbāh,* 14.

37. Ibn Nujaym, *Ashbāh,* 15.

or silently (into one's consciousness) before practicing the act; and, as far as the fiqh goes, there are no requirements for an "understanding" or knowledge of any practice. Should a pilgrim know about all the different twists and turns of pilgrimage? Ṣūfīs, such as Ghazālī (d. 505/1111), posed such requirements on intended practices, but the fiqh only limits itself to manifest intentions in the form of statements, which do not have to be orally stated and heard by others. Needless to say, since intention is not a deep matter of consciousness, the borderline between practices that require intention and those that don't, is indeed very thin. In fact, even though the niyya requirement on most ʿibādāt is formal, imposing it on contracts would have placed the courts into a totally different situation, requiring from them, say, an assessment of the intentions or the individual wills of the contracting parties. In other words, the distinction between subjective versus objective evidence would indeed have been crucial.

In fact, once we move into domains with "legal" implications, the requirement for intent ceases—with notable exceptions, however, such as judging, which anyhow is looked upon as part of the *ʿibādāt:* "judging is rewarded on intent."[38] But buying, selling, renting, donating, gift giving ("donating while in a joking mood is legally valid"), and the like, are all independent of intent. So is crime—at least indirectly. In fact, a court must know whether the accused committed his crime on purpose (*qaṣd*) or not.[39] But, surprisingly, knowing the intent of the accused does not require delving into the subjective meaning of the act since the tool of the crime (*ālat al-qatl*) is all by itself enough to decide on intent:

> Punishment is tied to the purpose of the killer for committing his act. But they said: if purpose is hidden [*bāṭinī*], the tool is then what reveals it. Killing someone with a tool that divides the body parts is usually considered as a purposeful act and is subject to punishment. But if the victim was killed with a tool that does not divide the body parts, but nevertheless kills in most instances, then that quasi-premeditation [*shibh ʿamd*] would not require punishment according to the greatest imām [Abū Ḥanīfa].[40]

The separation of all those elements—practice, intent, statement, purpose, act—in practices with direct legal implications tremendously narrows the procedures of the courts. By freeing them from all subjective components of a transaction, contract, testimony, crime, etc., the courts are limited to face-value statements. Connections are no longer between an action (*fiʿl*), the subject (*fāʿil*), and intent (*niyya*), but between the explicit meaning of statements. In

38. Ibn Nujaym, *Ashbāh,* 18.

39. See below Chapter 11 on crime.

40. Ibn Nujaym, *Ashbāh,* 20.

fact, sharī'a law reduces major practices into their basic linguistic components: thus, customs, testimonies, contracts, opinions, and the like, are all reduced to statements (*alfāẓ lughawiyya*) whose "real meaning (*al-ma'na al-ḥaqīqī*)" is what matters foremost; only if an ambiguity reveals itself at that level should the "metaphorical meaning (*al-ma'na al-majāzī*)" become, in turn, essential. But whatever of the two meanings is looked upon, intention is out and seldom does it come into question.

The ambiguity of pre-modern discourses

A word of caution before we proceed in our discussion of linguistic custom. The reader is now in the legitimate position of asking whether in our démarche towards Ḥanafism we have manifested an over-confidence in accepting the fuqahā' assertions at face value. What indications, if any, do we have that the juristic typology prescribed by an eminent mujtahid of the caliber of Ibn 'Ābidīn (and few others as well) had any practical value, or that at least it was accounted for by the practitioners of law? Was the distinction between mujtahids and muqallids that significant, and were the former the driving force behind legal change? In fact, the general suspicion, common in contemporary literature—hence the excessive focus on the sharī'a court records and the Ottoman archival records on the basis of their "reliability," not to mention their alleged non-ideological character on the basis that they lack an authorial subjective point-of-view—is that all texts authored by an individual are a suspicious entity in the first place. To make things worse, the fiqh texts are even less reliable since they tend to be obsessively locked into a fictitious past, and hence much less informative about the present than we would have liked them to be. In short, and *in toto,* such texts are not much of an informative source, or are unreliable at best.

Even though such criticisms and suspicions share their own merits, they nevertheless tend to be naïve in ignoring all the assumptions behind discursive analysis in general and the ambiguities of pre-modern discourses in particular. Let us note beforehand that there is no text as such that does not embody a discourse, so that a court record carries within it—or at least assumes—a discourse in the same way that a fiqh manual does. Since originating from different "legal" instances, such as the enterprise of the fiqh, the sharī'a courts or the regional councils, and sultanic (bureaucratic legislation), those discourses end up being very different from one another in both content and structure, even though they tend to overlap and borrow heavily from each other. The traditional way of looking at discourses (or ideologies as some would like to call them) fails when it attempts to lock one of the discursive levels—for

example, the sharīʿa courts—as the most "decisive," meaning the one which, in the final analysis (as the Marxists would say), forms the essence of "practice." To begin with, all discourses are by definition theoretical—because of an abstract use of language and a peculiar way in ordering things—and practical since they contribute in making a particular reality possible. To be sure, our method will irritate those who reason in terms of "theory" and "practice" since nothing in our understanding of the texts matches such a dichotomy, and once we give up on such preliminary divisions, it will become more obvious that all texts, whatever their institutional origins, will represent similar difficulties of interpretation. Hence the assumed "practicality" of the court records will not make them more "reliable" from our perspective, and several issues need to be addressed in order to render their reading more accessible, hence more "reliable." In fact, the so-called "reliability" or "objectivity" does not originate from the text itself, but from the process of contextualization which helps in a questioning of the text, and which lets us discover its *modus operandi,* on the one hand, and its *modus vivendi* with other texts, on the other.

But probably the most crucial issue at hand is the specific nature of pre-modern discourses and the particular difficulties they generate even from preliminary interpretations. To begin with, such discourses do not seem concerned either with historical change as such or with the historicity of their own becoming. Ḥanafism, for example, looks upon every discursive activity it generates—which, if perceived as "new," is looked upon as an independent act of ijtihād—as part of an old and preestablished order that originates in the sharīʿa and the discourse of the founders. Every act of ijtihād, even though conceived as an independent act, is thus part of a much more global enterprise, one that spans over several centuries, and into which every single act of ijtihād finds its place. Thus, even though Ibn ʿĀbidīn enumerates the most prestigious mujtahids one by one and then creates a juristic typology out of his list, it was indeed the place of the mujtahid in that hierarchical flux that ultimately turned out to be the most relevant. By giving each one his own place, the individualistic nature of their enterprise was put aside in favor of the coherence of the madhhab. Such a coherence is obviously a legal fiction, but one whose role was essential in the creation of discourses that were part of a more global enterprise.

From a modern (if not modernist) perspective, such discourses might therefore look disappointing because of the non-historical nature of their enterprise. But it is precisely this attachment to a fictitious past, while representing the enterprise of the fiqh as "adapting," in its own right, to contemporary concerns, which characterizes Ḥanafī practice, and which needs to be reconstructed in terms of the paradigmatic activities it has generated. Thus, in the case of custom, for example, it was posed—in a way similar

to the divine normative rules—as a self-generating referent, and one whose signs (*adilla*) only point to other linguistic referents. But if the scholars had no problem pointing to that linguistic component of custom, the "historical" relations that custom might generate within a specific period was, as we shall see in the following section, of utmost concern, and remained for the most part an unresolved issue with too many diverging opinions.

"Customary law" and the fiction of legal change

It is generally accepted that "custom" plays a major—albeit uncertain and undeclared—role in Ḥanafī practice. To be sure, the importance of such a role varies from one madhhab to another, and is also very much affected by the historical making of a particular epoch. But beyond that, everything about custom remains uncertain, if not indeterminate. For one thing, it is unclear how an unwritten law, or *lex non scripta,* could survive so long as to pose itself side by side with the canonical sharīʿa law. In fact, not only is it difficult to imagine that an orally established custom would pose itself as law, but that it would eventually become a written law, or *lex scripta.* That process specifically is still more convenient to reconstruct in theory (in particular by means of anthropological arguments and the like) than to describe historically, that is, by means of concrete empirical situations that would show the passage from one form of law to the other. If we accept the idea that Ḥanafī practice owes so much to custom, it then remains to be seen which customs were assimilated within the fiqh, and during which specific periods and regions, so as to become an integral part of its normative rules. The question is so elusive due to the oral, hence unwritten, nature of custom, that each argument and counter-argument would necessarily run into unavoidable circles. The question as to whether custom should be perceived as an integral part of or autonomous from the fiqh owes its difficulty precisely to the oral nature of custom. Another difficulty is related to the *regional* nature of custom: How would a norm accepted as such within a certain locality be assimilated within the larger corpus of canon law, hence assume a degree of "universality" it has hitherto not known? What further adds to the confusion is the fact that it is usually an *anthropological* notion of custom that dominates the debates on custom and law, which by itself is very different from what custom-as-norm implies. In fact, it is not enough for a custom as such, simply because it is known and accepted within a locality, to become a de facto legally accepted norm, even if it remains at its most basic unwritten stage. Indeed, if custom is accepted on a de facto basis, that is to say, by the sheer fact that it exists and perseveres in its being, it would be unable to furnish a "demonstrable rationality," but would exist by

"the simple fact of its having remained in usage,"[41] while the multi-layered fiqh belongs by contrast to a radically different logic in sorting out norms, interpreting them, and in creating new ones through interpretation.

Several difficulties ought to be dealt with. First, the relationship between Ḥanafī and customary practices is historical, and it thus needs to be seen whether, since its formative period, the former took the challenge of custom seriously, and if so, then its representations of custom are what matters the most. Second, when looking upon specific historical instances of a Ḥanafī "assimilation" of custom we must ask, is it possible to remain situated "inside" the discourse of the fuqahā' and accept their representations of customary practices? In other words, since custom, due to its oral and unwritten character, cannot be assessed all by itself but only through the discourse of a "competing" legal practice, does that impose limitations towards a modern assessment of custom?

Third, a final limitation comes to mind, regarding the handling of the fiqh texts: Which texts ought to be chosen specifically for our task? As in all the chapters to follow (on contracts and obligations, land, crime, etc.), the choice of texts has been left to its minimum so as to be able to follow the construction of their discursive logic and their internal logic, whether coherent or not, as closely as possible. Only to paraphrase J.G.A. Pocock, one would add that the histories of such practices not only relate to one another by virtue of their discursive nature, but that they have a history by virtue of becoming discourse.[42] Similarly, custom has only a history once assimilated to the canonical discourse of the fiqh, that is, by becoming law. Indeed the history of custom, like that of the fiqh, could be looked upon as one of an open-ended interaction of *parole* with *langue,* where new blood is being injected by the constant action of speech upon language.

Custom within the perspective of law and economics

Max Weber distinguishes between law, convention, and custom, which roughly correspond to what the fiqh meant by *shar', 'āda,* and *'urf* (see below).[43] Thus, custom is,

41. J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), 16: "Customary law is a technical and traditional, rather than a rational structure."

42. J.G.A. Pocock, *Politics, Language, and Time* (Chicago: University of Chicago Press, 1989), Chapter 1: "Languages and Their Implications: The Transformation of the Study of Political Thought," 3-41.

43. The following discussion is based on a chapter from Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), "The Economy and Social Norms," 1:311-338, and, Richard

> a typically uniform activity which is kept on the beaten track simply because men are "accustomed" to it and persist in it by unreflective imitation. It is a collective way of acting [*Massenhandeln*], the perpetuation of which by the individual is not "required" in any sense by anyone. (1:319)[44]

Since Weber looked upon law, convention, and custom, as belonging "to the same continuum with imperceptible transitions leading from one to the other" (*ibid.*), he mainly perceived the difference in terms of the degree of "coercion" that a binding norm—whether law, convention, or custom—imposes on individuals. Thus, convention is the least coercive of all (while custom is coercive without being "required"):

> *Convention,* on the other hand, shall be said to exist wherever a certain conduct is sought to be induced without, however, any coercion, physical or psychological, and, at least under normal circumstances, without any direct reaction other than the expression of approval or disapproval on the part of those persons who constitute the environment of the actor. (*ibid.*)

Thus, like the *'āda,* convention acts as if situated at the "root" of custom even though it does not always presuppose it. In fact, it is perfectly possible for a custom to develop without any convention that behaves as a "supportive" agency. This is particularly true in the economic sphere where customs, which, even though they might not have any strict legal equivalent, are nevertheless needed within a community. Hence Weber perceives custom not only in terms of coercion but, more important perhaps, in its economic effectiveness (or religious, or political) once achieving a quasi-legal status.

> At any rate, adherence to what has as such become customary is such a strong component of all conduct and, consequently, of all social action, that legal coercion, where it transforms a custom into legal obligation (by invocation of the "usual") often adds practically nothing to its effectiveness, and, where it opposes custom, frequently fails in the attempt to influence actual conduct (1:320).

Custom could thus at least be as equally binding as law, and in the absence of a strong rational legal system which receives its institutional support from the state, custom could be the only binding norm within the community, even though such a role is even possible in advanced liberal societies.[45] Convention

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Swedberg, *Max Weber and the Idea of Economic Sociology* (Princeton: Princeton University Press, 1998), Chapter 4.

44. All references to Weber are from his *Economy and Society.*

45. It has become common in contemporary anthropology to oppose custom with law, on the one hand, and to relate custom to practice (linguistic interactionism or general theory of practice), on the other. Thus, for example, as part of his "theory of practice," Pierre Bourdieu states that,

> the "customary rules" preserved by the group memory are themselves the product of a small batch

is equally effective since, in the same way, "The existence of a 'convention' may thus be far more determinative of [a] conduct than the existence of legal enforcement machinery" (*ibid.*). Thus, for example, in Ottoman societies where the legal system was limited in its capacities and scope, the argument would go that custom would serve as a truly binding force, or as some kind of a cheap economic alternative to a limited judiciary. But it all depends, however, as to what we understand in this particular case by "legal system": if we thus assume that the sharī'a courts and the work of all kinds of scholars constitute the essence of the "legal," then we are confronted with a system whose force of coercion was instituted more by the customary norms of the various communities than by any state agency. Custom and Ḥanafī practice would then be perceived, within this perspective, as "acting together" and as a normative system which for the most part remained outside the control of the state.

After laying out his definitions, Weber becomes mainly concerned with custom becoming law, on the one hand, and the subjective meaning of custom and law, on the other. Custom becoming law does not seem to be a cumulative process from the Weberian perspective: "the emerging innovation is most likely to produce consensus and ultimately law, when it derives from a strong inspiration or an intensive identification" (1:322). There is a parallel here between the coming of a new religious system and a legal one since both require

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of schemes enabling agents to generate an infinity of practices adapted to endlessly changing situations, without those schemes ever being constituted as explicit principles. This is why, like Weber's Kadi-justice, customary law always seems to pass from particular case to particular case, from the specific misdeed to the specific sanction, never expressly formulating the fundamental principles which "rational" law spells out explicitly (e.g., all men are equal in honor)... (*Outline of a Theory of Practice,* Cambridge University Press, 1977, 16).

The interesting point here is the parallelism that Bourdieu draws between "customary law" and Weber's Kadi-justice, namely the fact each one of those systems—or "legal orders"—avoids general and abstract principles in favor of a case-by-case strategy. Thus, regardless of the fact whether such a characterization of "Islamic" judicial decision making is correct or not—and it should be emphasized that Weber did not intend to limit Kadi-justice to Islamic societies only—what is here implied is not the fact that a case-by-case strategy means that the system is open for total improvisation, but that a small number of "generative schemes" contributes towards an endless number of practices. In other words, customary practices function like language (even though Bourdieu does not reduce them to linguistic phenomena): on the one hand, they have to conform to a small number of grammatical rules which individuals are not even conscious of; and, on the other hand, those grammatical rules prepare for an infinite number of linguistic games—the potentials of any language are, indeed, infinite.

In the case of Kabylia, Bourdieu notes that some of the customary laws explicitly assimilated within the *qānūn* became so precisely because they were stated in such a way as not to further aggravate a conflict. Thus in the case of theft, for example,

The generative schemes are so generally and automatically applicable that they are converted into explicit principles, formally stated, only in the very case in which the value of the object stolen is such as to sweep aside all extenuating or aggravating circumstances (*ibid.*).

charismatic authority. Thus, what usually pushes forward a set of conventions, rules, customs, and customary laws, from their generally "accepted" status based on an oral "consensus," and "transform it into enacted law" (1:323) is an unusual experience of strong identification. In Islamic history, the construction of the legal system came into being as an outcome of the charismatic religious figure of the Prophet Muḥammad. Similarly, the bulk of the Ottoman qānūnnāme would not have been possible without the establishment of a new ruling dynasty whose conquests and land acquisitions made imperative the enactment of new codes (war was always an agent for a new set of laws and regulations since all conquerors were in need of making their laws explicit). But what about modern times when conquests are less common and when industrialized societies grow "peacefully"? Is "custom" still a significant legal category? On what basis do legal codes change: customs becoming laws or laws made from previous laws, or is it a combination of both? Weber had no general theory that would incorporate custom into gradual changes within "peaceful" legal systems, that is, not subjected to wars and conquests, even though "discovering empirical processes in which nonstatutory norms arise as valid customary law" (2:753) would be a valid enterprise since it would point to historical processes where a norm became law. He did, however, see a parallel between the "so-called 'silent trade' among primitive peoples as well as in modern business, especially on the stock exchange" (1:328). This is a sign that custom—in lieu of codified laws—could be effective in modern contexts such as the stock exchange. In fact, Weber thought of custom and convention not so much in terms of modernity versus primitive societies, but more so in terms of what following a "rule" or convention meant while being tied to a specific "environment":

> the fact that some type of conduct is "approved" or "disapproved" by ever so many persons is insufficient to constitute it as a "convention"; it is essential that such attitudes are likely to find expression in a specific environment. [...] It does not matter in this context whether the test is constituted by profession, kinship, neighborhood, status group, ethnic group, religion, political allegiance, or anything else (1:324).

But, "Today economic exchange is quite overwhelmingly guaranteed by the threat of legal coercion" (1:329), and Weber was probably thinking in terms of the routinization of contract law which many advanced societies had already completed: a firm state authority together with a well routinized and rationalized law of contract minimize transaction costs, which enable individuals to open up to strangers and take more risks. Even, however, the most advanced legal systems typically leave many things to be regulated outside the judiciary: "It is a fact that the most 'fundamental' questions often are left unregulated by law even in legal orders which are otherwise thoroughly rationalized" (1:330).

But the difference between those "thoroughly rationalized" systems and those which were less fortunate in rationalization might well be, among others, in the way they handle what lies "outside the law:" in the modern rationalized systems, the judicial seems to follow the rule of absolute necessity—avoid coding what is unnecessary, superfluous, or what could be regulated "on its own" (because there is, say, a professional environment that makes auto-regulation possible); however, in less rational systems, there is more reliance on custom as a way of avoiding explicitly formulated codes.

Change with the make-belief that it all conforms to tradition

As was common to many Ḥanafī scholars, Ibn ʿĀbidīn made a number of scattered remarks on custom throughout his work; however, only in one of his *rasā'il* ("epistles")—and the *risāla* is supposed to be a work of genuine ijtihād, since it must address issues that were either left out, or that at least were not handled in this form—does he devote an entire *risāla* on the issue of custom and habit ("The Propagation of custom while reconstructing some rulings on custom"). The paucity of such systematic texts is indeed surprising since, as noted earlier, the relationship between Ḥanafī and customary practices was crucial: it is only in analyzing the significance of custom do we realize how much the Ḥanafīs had to "accept" and absorb social practices that were "outside" their own norms. In fact, Ibn ʿĀbidīn is not interested in custom in general, but only in so far as it affects judicial decision making and legal doctrine. This raises the issue of a custom that is strictly "legal," and thus falls short of modern anthropological notions of custom (which tends to perceive custom within a context of social action): What are the implications then for reducing our understanding of social practices to their "legal" side only? In other words, what if those "customary practices," once anthropologically situated, turned out to be strategies of a different nature than what jurists thought they were? If the legal approach is necessarily reductive and limited to only few aspects of custom (whether legal or not), should we then reconstruct a different and more global notion of custom? In fact, once we accept the jurists at face value, we are then confronted with the social and political implications of their choice: the *fuqahā'* restricted themselves to that part of custom that mattered the most to them, that is, one that successfully integrated within their legal framework; while the remaining incognito part—the "residue"—the essential part for our purposes, had to be ignored altogether. The essential question is therefore to see whether such a reconstruction is at all possible (since custom is by definition unwritten, how can we then reconstruct custom within a historical perspective?); then pose the argument as to *why*

such a reconstruction is essential and whether it is feasible or not; and, finally, what is the significance of what is "left out" vis-à-vis what has been officially accepted by the jurists as "their" custom.[46]

Custom as *'urf* "is something which sharī'a law takes into consideration [*lahu i'tibār*], so that a ruling would be based on it" (2:112).[47] But custom as *'āda,* or "habit," based on Ibn Nujaym's *al-Ashbāh wa-l-naẓā'ir* and Hindī's *Sharḥ al-mughnī, "*is what becomes accepted by the human soul of things that keep recurring [*al-umūr al-mutakarrira*] and which are reasonable [*ma'qūl*] to healthy spirits." Those habits are of three types: 1) Public customs, *'urfiyya 'āmma,* which are of the most general type and are concerned only with public behavior such as making a public statement of the kind, "I refuse to step my foot in a particular home"—an assertion known in the fiqh as the "position of the leg" (*waḍ' al-qadam*) and "coming in" (*dukhūl*)—so that if I do step in, either by walking in or while riding an animal,[48] then I have broken my oath (*ḥanitha*). 2) Private customs, *'urfiyya khāṣṣa,* which represent what a group of people adopt as a common ground (*iṣṭilāḥ*) to conduct their daily business (or for other purposes); for example, the craft-guilds (*ṭawā'if*) use different *internal* "rules" in their ongoing business. Finally, 3) customary norms of the shar', *'urfiyya shar'iyya,* such as praying, or paying the *zakāt,* or pilgrimage, all of which "have their linguistic meanings [*ma'ānīhā al-lughawiya*] kept in accordance to their legal meanings" (2:112).

46. Despite the importance of custom as a source for the fiqh and the constant reminders in modern literature that custom contributes in establishing new norms, the potential of the fiqh literature in that respect has not been fully explored yet. For this chapter a variety of eclectic sources proved useful, among them, Ibn 'Ābidīn, *Majmu'at rasā'il Ibn 'Ābidīn* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.); in particular, "Nashr al-'urf fī binā' ba'd" al-aḥkām 'ala al-'urf," ["The Propagation of custom while reconstructing some rulings on custom"] in *Rasā'il,* 2:112-145, completed on Rabī' II 1243 (October 1827); Ibn Nujaym, "al-Qā'ida al-sādisa: al-'āda muḥakkama ["The Sixth Rule: Custom is of force"]," in *al-Ashbāh wa-l-naẓā'ir* (Damascus: Dār al-Fikr, 1983), 101-114; 'Alī Ḥaydar, *Durar al-ḥukkām sharḥu majallat al-aḥkām,* vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), articles 36-45, pp. 40-46; Muṣtafa Aḥmad az-Zarqā', *al-Madkhal al-fiqhī al-'āmm*, 3 vols. (Damascus: Dār al-Fikr, 1967-68), vol. 2 contains a long chapter on custom, and another one on the general Ḥanafī rules; Gideon Libson, "On the Development of Custom as a Source of Law in Islamic Law," *Islamic Law and Society* 4, no. 2 (1997): 131-55; Alan Watson, *The Evolution of Law* (Baltimore: The Johns Hopkins University Press, 1985), Chapter II: "Customary Law," 43-65; Pierre Bourdieu's *Le sens pratique* (Paris, 1979) on "the logic of practice;" and various sections of Weber's *Economy and Society,* in particular his uncompromising *Rechtssoziologie,* in vol. II; Louis Assier-Andrieu, "Penser le temps culturel du droit. Le destin anthropologique du concept de coutume," *L'Homme* 160 (2001): 67-90. Assier-Andrieu argues that the polysemous concept of custom refers to the postulated essences of both law and culture, the latter thus taken to be universal. It also conveys the notion of ethnic and social diversity (and solidarity), and can serve as the vector of a grounded national unification. Paradoxically, the concept of custom harbors both a doctrine of substantive law as well as radical criticism of it.

47. All in-text page numbers in this section refer to volume 2 of Ibn 'Ābidīn's *Rasā'il.*

48. The two events are supposed not to have happened accidentally.

How do *ʻurf* and *ʻāda* interrelate, and could they be used interchangeably for our purposes? Since the term *ʻāda* is closely connected to *muʻāwada,* it necessarily implies the *repetition* of a specific act an infinite number of times "till it becomes accepted by the souls and minds without even thinking about it [*min ghayr ʻalāqa ʻaqliyya,* "without relating it to the mind"]." Thus, an *ʻāda* would become *ʻurf* through this process of *infinite repetition* and, from this standpoint at least, "they share one and the same meaning [*maʻna*] even if they differ conceptually [*mafhūm*]." In other words, what is of interest to sharīʻa law is primarily the *ʻurf,* or the *ʻāda* that has materialized as *ʻurf* through a process of infinite repetition to the point that we automatically, and without much thinking, follow it in our daily lives. Furthermore, the *ʻurf* is at the same time "deed [*ʻamal-ī*] and word [*qawl-ī*]" (*ibid.*), meaning that it could be as practical as "agreeing" (through the long habit of custom) on eating a specific meat among a group of people (*qawm*) so that if I were asked to buy food or meat for those people, I would know exactly what to purchase following the rules of the *ʻurf ʻamalī,* without even anyone reminding me of what those rules or customs are. As to the linguistic side of the *ʻurf,* it consists in associating a word (*lafẓ*) with a meaning (*maʻna*) so that such an association becomes automatic and a matter of habit: a case in point would be the currency used in a locality since by simply uttering the word itself, we know what we are talking about. Thus, the difference between the *ʻurf ʻamalī* and *lafẓī* is that the former is oriented towards *objects* in the first place: the word meat in a particular locality designates in practice a specific type of meat; while the second is *language* oriented: the specific *name* of a currency tells us—through custom—what we are dealing with.

Having calibrated the distinction between customs based on deeds and others on words, Ibn ʻĀbidīn proceeds to link them, rather confusingly, to his earlier distinctions of *ʻāmm* and *khāṣṣ,* of public and private (or the "common" and the "specific"): thus, the word-based *ʻurf* is specific to the *ʻāmm,* as the currency example shows since it ought to be accepted by the entire community (it wouldn't make much sense that only a specific—private—group of people adopts a particular currency); as to deed-based *ʻurf,* it should also be *ʻāmm,* at least from the point of view of the Ḥanafīs (though not the Shāfiʻīs) (2:113). So if both word- and deed-oriented *ʻurf* are *ʻāmm,* what is then the use of such a classification? The aim is indeed to give the *ʻurf ʻāmm,* whether based on deeds or words, a higher status and make it acceptable to the sharʻ on the sole basis that it has become the custom and habit of an entire community for a long period of time. It should be stressed that the distinction between *ʻāmm* and *khāṣṣ* is, strictly speaking, between the community as a whole and the smaller professional or other groups that are part of this community; or between a locality (region) and the larger province (or empire); in other words, it does

not have much to do with our modern categories of "public sphere" versus "individual (private) rights."

Table 1-1
Public versus private custom

Public custom, 'urf 'āmm	*Private custom, 'urf khāṣṣ*	*Legal custom, 'urf shar'ī*
Deed-based *'urf* (*'amal-ī*) Word-based *'urf* (*qawl-ī*)		
Customs and habits (*'ādāt*) accepted by the community at large, and hence have a "public" value.	Customs shared by specific—usually professional—groups, and hence have a "private" value.	The customs which sharī'a law explicitly approves: praying, fasting, marriage, divorce, etc.

Which *'urf*s and *'ādāt* are "legitimate" enough to be "accepted" by or "integrated" within the larger framework of sharī'a law? A *ḥadīth* in Ibn Ḥanbal's *Musnad* states that "What the Muslims see as good for themselves is also accepted by God as good." But, as noted earlier, it was in Ibn Nujaym's *Ashbāh* that custom was finally given in Ḥanafī practice a manifest role, to the point that one of the "general rules (*qawā'id kulliya*)" was specifically devoted to custom. Those are indeed supposed to combine the "particular" with the "general" so that a scholar, jurist, judge, or muftī would all be able to work out a specific issue at hand by means of a general and abstract rule. In themselves, the *qawā'id* are an even more powerful tool than analogy since the latter proceeds by comparing two particulars, while the "general rules" link a particular (*juz'iyyāt,* or *furū'*) to the more general (*kullī, ghālib*). A case in point is the issue of the validity of custom in judicial decision making. The sixth general rule (which the Majalla has reiterated as its rule 36) states that *"al-'āda muḥakkama,"* or "custom is a force in adjudication" (also: "custom is of force"). Indeed, throughout the section devoted to his sixth rule on "habits" (*'ādāt*) and their corollary, the *'urf*, Ibn Nujaym argues in favor of considering at least some *'urf*s into sharī'a law. The reason why custom is so tenacious is that it is so well "known" (*ma'rūf*) within a particular community to the point that people—even court officials, judges, *muftī*s, etc.—start applying it in lieu of sharī'a law. Hence Ibn Nujaym's assertion that "what is known by custom is identical to what is placed as a condition in sharī'a law [*al-ma'rūf 'urf-an ka-l-mashrūṭ shar'-an*]" (2:108).[49] And few lines later, he will go even as far as to assert that "silence acts like a stipulation [*al-sukūt ka-l-ishtirāṭ:* silence

49. All those statements, which originate in the *Ashbāh,* are quoted verbatim in Ibn 'Ābidīn's *risāla.*

has the status of stipulation];" or "what is common knowledge enjoys the status of stipulation [*al-ma'rūf ka-l-mashrūṭ*]," all of which identify "common knowledge" with "silence." The *'urf* is indeed so well-known, *ma'rūf,* to the point that no one even bothers to elicit it anymore—hence acts in a background of silence: in other words, it belongs to the domain of the "unconscious" or the *impensé* of a particular community. The function of a jurist, therefore, will be precisely in *reminding* a society of those forgotten customs over the years in terms of its basic *'urf*s; and the only purpose for that kind of operation is indeed judicial decision making. Obviously, not just any *'urf* is of interest to the faqīh: only the ones that do not "match" in one way or another the commands of sharī'a law—and these are quite numerous.

Part of Ibn Nujaym's arguments are based on his elaborations of the complex relationship between *'urf* and language. Sharī'a law, unlike custom, is based on language, or more precisely on the written word, hence on a set of abstract signs which are more oriented towards the generic than the particular. A legal opinion would thus typically speak of bread in general rather than of a specific kind of bread common, say, to the inhabitants of Cairo. By contrast, the *'urf* stands as the exact opposite: it is specific to this-and-that rather than generic and abstract. Hence, there is, as Ibn Nujaym put it, a natural "contradiction between custom and language [*ta'āruḍ al-'urf ma' al-lugha*]" (106). Thus, it is by considering the *specificity* of the *'urf* that the jurist seeks to incorporate it into sharī'a law. This is a very delicate matter that requires great knowledge of the community (or locality) in question, its inhabitants, their manners, and the history of both legal institutions. At this point, Ibn Nujaym introduces the distinction, already encountered in Ibn 'Ābidīn's *risāla,* between *'urf 'amalī* and *'urf lafẓī,* but the distinction is here more meaningful:[50] the *'urf* is in essence linked to practice, that is, to *'amal,* and the habit itself is nothing more but a *'urf 'amalī* (*laysat al-'āda illā 'urf-an 'amali-yyan*) (2:107). So, the *'urf* is by definition practical, specific (*mukhaṣṣaṣ*), denotes particular objects (*muqayyad*), an association of accumulated (body) habits over long periods of time, and related more to the "external" (*ẓāhir*) state of things, *al-ashyā' 'ala ẓāhir mā jarat bihi al-'āda* (2:110); by contrast, Ḥanafī practice is language-based, general, and more interested in the intrinsic meaning of things and their relation to the scriptures, the madhhab, and the *uṣūl al-fiqh.*

What is it that gets accepted as legalized custom, that is, *'urf* validated by sharī'a law? Ibn 'Ābidīn quotes Sarakhsī's *Mabsūṭ* as claiming that "what is

50. See also Ibn 'Ābidīn, *Radd,* 3:772-74: "on the issue of identifying the *'urf 'amalī* with the *'urf lafẓī,*" in which he reiterates the view that, unlike the Shāfi'īs, the Ḥanafīs consider the *'amalī* as "specific," *mukhaṣṣaṣ.*

firmly established by custom is also firmly acknowledged in the [sharī'a] text [*al-thābit bi-l-'urf ka-l-thābit bi-l-naṣṣ*]" (2:113).[51] The problem, however, is precisely to determine how things get "firmly established by custom" since obviously there are many *'urf*s well absorbed within their own communities but with which the fuqahā' would certainly disagree, and both Ibn Nujaym and Ibn 'Ābidīn provide ample examples on this matter. Even the general rule of public versus private does not seem to operate well in many concrete historical situations since, put simply, what establishes an *'urf* as valid is its intrinsic force and power—the fact that it has been accepted by the people of a locality.

The rest of Ibn 'Ābidīn's *risāla* is mostly devoted to a variety of problems that might arise between the *'urf* and sharī'a law. This is especially true at the practical level, that is, for *muftī*s and judges whose work is oriented towards concrete day-to-day matters. Thus, quoting first a passage from Zāhidī's *Qinyah,*[52] that "the *muftī* and judge have no right to make a ruling based only on what Ḥanafī practice formally establishes in its *uṣūl* [*ẓāhir al-madhhab*][53] and to forgo custom altogether by dumping the issues it raises into the common stock of tales [*naql al-mas'ala 'an-hu fi khizānat al-riwāyāt*]" (2:113), Ibn 'Ābidīn seems concerned with two related issues. The first is when an established custom in a particular locality has no equivalent in sharī'a law, that is, when the law is *silent* on that particular subject matter; in this case, muftīs and judges would rule in conformity with such a custom but only on the condition that their ruling is in accordance with the general precepts of the sharī'a (some examples will be provided later). The second is when an established custom comes in direct contradiction with what has already been established in sharī'a law; for such cases, and those did constitute the majority, Ibn 'Ābidīn's opinion seems to be twofold. On the one hand, when such a conflict does occur, then sharī'a law is given the priority; but, on the other hand, and in practice, things could turn out more confusing: for one thing, sharī'a law is based on the notions of *ẓāhir* and *bāṭin,* and a *'urf* would not fit well with what the law *formally* acknowledges in its *ẓāhir,* that is, as objective evidence only. In other words, things could turn out differently

51. Which became one of the several general rules in the Majalla devoted to custom (45). The other rules have the following numbers: 36 (main rule on custom as a "force in adjudication," from which all others follow), 39 (crucial rule on the relation between time and custom, and hence on the necessity of adapting opinions and their meanings to the changing times), 40 (on speech, writing, and custom), 41, 42, 43, 44, 45, and 70.

52. Najm al-Dīn Mukhtār b. Maḥmūd al-Zāhidī (d. 658/1260), *Qinyat al-munya li-tatmīm al-ghunya,* known also as the *Qinyah.*

53. *Ẓāhir al-madhhab* has probably the same connotation as *ẓāhir al-riwāya,* i.e., Shaybānī's six treatises that lay down the foundations of the Ḥanafī madhhab.

once we get into their intrinsic meaning, the *bāṭin*. The other problem in this complex relationship between custom and law is that older legal opinions upon which the legitimacy of the *madhhab* is founded become so out of touch that they do not apply to present times: in short, they need to be re-adapted and this is primarily the work of muftīs and judges, and also the fuqahā' to a certain degree.

> How is it possible to practice [*yu'mal*] with a custom that is in contradistinction [*mukhālif*] with what has been formally accepted in the *uṣūl* of the Ḥanafī madhhab [*ẓāhir al-riwāya*], since the latter would be solely based on the Text [*ṣarīḥ al-naṣṣ*] from the Qur'ān, sunna, and consensus [*ijmā'*]? There should be no consideration to custom that is in direct contradiction [opposition] to the Text because, according to Ibn al-Humām, custom could be invalid [*bāṭil*] while the Text is never so (2:113).

Thus custom is invalid when directly opposing the scriptural texts on whatever stance. Such a broad assertion, however, does not work all that well in practice. For one thing, a custom would not have pressed to become law had there been any equivalent in sharī'a law. For another, customs are all too powerful to be ignored by the fiqh, in particular when they achieve the status of law within a community. Being aware of this, but without explicitly stating it as such, Ibn 'Ābidīn's main concern becomes in delimiting which customs ought to be accepted as legitimate. This also leads him to another question: historically speaking, which customs imposed themselves on Ḥanafī practice to the point of becoming indistinguishable from the latter? And for which specific reasons? Did such customs impose themselves simply because the law was silent, obsolete, or confusing, or because it prohibited some practices that custom had to impose forcefully?

Ibn 'Ābidīn goes back once more to his distinction between private and public custom, while avoiding identifying custom into a single monolithic bloc. Both types of customs pose no problem to the fiqh as long as they are in accordance with the legal texts. In the case of a conflict, then, either 1) the *'urf* is in every aspect in opposition to basic premises of the fiqh (*dalīl shar'ī*) on a particular issue, such as imposing abusive interest rates on loans (*ribā*), alcoholic beverages, wearing silk and gold—the custom is then rejected as illegal; or 2) sharī'a law has a well established general opinion (*dalīl 'āmm*) on a particular issue, but custom contradicts it on a specific part only (*khālafahu fī ba'ḍ afrādi-hi*), custom would then be accepted on the condition that it is public, *'āmm*. Thus, a *'urf khāṣṣ* which contradicts even minor aspects of sharī'a law is invalid. In order to fully understand such statements, we need to work out more fully the distinction between private and public, and also see, from concrete examples, how the *dalīl 'āmm* would be challenged by custom in some of its parts (*afrād*).

In order to pursue his point on the difference between private and public, Ibn ʿĀbidīn gives the example of the town of Balkh[54] (in Khurasān) which apparently had a practice (*taʿāmul*), approved by their elders (*mashāyikh*), in providing their weavers *in advance* with all the materials they needed in order to exchange it later, once the production cycle was complete, on a one-third basis. The issue is brought in analogy to a classical problem for the Ḥanafīs known as "Qafīz al-Ṭaḥḥān," in which a man gives his grain to a baker so that he would grind it for him, and for which the baker will receive a fraction of the produce in lieu of his labor. It is in short the classical problem of receiving an equivalent of a payment (as *ujra*) out of something that does not exist yet. Even though Ibn ʿĀbidīn is not clear enough on what this one-third implies, it does seem, however, that the weaver would keep one-third of the produce as *ujra* for himself and give the remaining two-thirds to those who provided him with the material. Yet, despite the existence of similar types of sharecropping contracts such as the *murāba'a* and *musāqāt* among the peasantry,[55] which were a one-fourth association (the tenant-farmer would keep one-fourth of the produce and give the remaining three-fourths to the "proprietor" or *multazim* for using the land), the problem that the one-third association posed for jurists was of another nature. For one, the weaver was provided in advance with the needed material, and in exchange for this "gift," he would *later* give its "equivalent" in commodities he produced all by himself. The whole problem is therefore to determine what this "equivalent" means since what is being exchanged are two different things: different commodities made up of the same substance, and the second commodity, the cloth, has an added value to it—the amount of labor of the weaver. It is therefore the time delay that poses a legal problem, in addition to the different nature of the commodities, all of which would create a phenomenon similar to money-lending with interest (*ribā*). Jurists did even coin a term: *istiṣnāʿ,* which means "to sell what one does not possess while forbidden from doing so" (114). Thus, *istiṣnāʿ* (from *ṣanaʿa,* to produce) means that one is selling a commodity in advance, which is yet to be produced, and hence, for the jurists, that thing is non-existent (*maʿdūm*); and to do so, another person, the creditor, has to furnish a "guarantee" by providing

54. The importance of the city of Balkh (now located in central Afghānistān) in Ḥanafī mythology stems probably from its crucial location at the crossroads of caravan trade routes that linked Persia with India, thus providing the city with an important silk trade with China. Having been conquered by the Muslims in the first Hijrī century (and then sacked by the Mongols in 1222), it became an important place for legal knowledge precisely because of its high-powered mercantilism, and thus provides an example of a "minor" and peripheral city to have offered, through a combination of its own regional customs, which touched upon the practices of a dynamic merchant class and an open-minded 'ulamā', crucial normative values which have been acknowledged and practiced far beyond their center of origin.

55. See below, Chapter 3 on contracts and obligations, and the section on sharecropping.

the seller with the raw-materials. So what those weavers in the aforementioned village were in fact "working with" and became part of their custom—*'urf* is usually associated with *'amal,* that is, "labor" in the sense of praxis—was the illegal practice of *istiṣnā'*. That was a case where an *'urf khāṣṣ* specific to the inhabitants of a particular village was in direct opposition to the legal texts because sharī'a law "prohibits selling what the person does not possess" (2:114). One would therefore think that a private custom such as the *istiṣnā'* would have to be dropped altogether because of its illegal character; there should, however, be a way to work around this problem since,

> if *istiṣnā'* is permitted in practice—and *istiṣnā'* means selling what one does not possess; an act which is forbidden—what we are in fact doing is making the legal text more specific [on a particular issue] [*takhṣīṣ minnā li-l-naṣṣ*] which prohibited a person from selling what he does not possess. We are therefore not abandoning the text altogether (*ibid.*).

In other words, if Ḥanafī practice decides to incorporate a custom like *istiṣnā'* within its legal corpus, it is not abandoning the precept that "selling what one does not possess is illegal." This general law is only narrowed down (*takhṣīṣ*) to the custom of *istiṣnā',* which implies that weavers receive their raw materials in advance in exchange for commodities they will exchange only later. Thus, because the fiqh is by essence general and abstract, it needs, vis-à-vis custom, to be re-conceptualized on a case-by-case basis. That, indeed, seems to have been Ibn 'Ābidīn's "method" for bringing the fiqh and custom closer so that one does not ignore the other. Since custom narrows down the fiqh to specific practices in space and time, it injects it with a life of its own, so that the whole legal apparatus becomes patched with customary laws that were the creation of daily practices of individuals and their groups.

However, the concept—or "method"—of *takhṣīṣ* did not win the hearts of all the jurists since there was no consensus around it: "The text should not be left out for the sake of some [customary] practice [*ta'āmul*], but only narrowed down [*takhṣīṣ*]. Our jurists [*mashāyikh*], however, did not permit such a narrowing down because this is a practice [*istiṣnā'*] which involves the inhabitants of a single village only" (*ibid.*). Such an opinion has already been reiterated in Ibn Nujaym's *Ashbāh* and several other fiqh manuals. The problem, however, is a serious one and goes beyond being able to determine what is legal and what is not. For one, many customary practices will persevere as long as they are needed; they are entrenched in the minds of individuals and societies and there is no way that anything could stop them. For another, customs are by definition infinite in number, each one being usally region specific. But while the fiqh runs the risk of marginalization if it persists in its staunch position towards customary practices, at some point, some conciliatory statements begins to emerge in Ibn 'Ābidīn's *risāla:*

> People became accustomed to the trick [*ḥīla*] [of *istiṣnā'*] through common knowledge [*bi-l-ta'āruf al-'āmm*] because this is a much needed practice which they have been accustomed to from one generation to the other; so it became permitted despite the fact that it did not fit with [the logic] of analogy [*jāzat 'ala khilāf al-qiyās*]. (2:115)

Analogy (*qiyās*) is the fourth rule established in Shāfi'ī's *Risāla,* as a fourth step after the Qur'ān, sunna, and consensus (*ijmā'*), in order to establish the validity of a legal rule as part of sharī'a law. In a previous statement, asserting that "analogy does not apply when we are dealing with the case of a single village [*al-qiyās lā yutrak bi-ta'āmul baldah wāḥida*]" (*ibid.*), Ibn 'Ābidīn nevertheless eliminates analogy altogether—at least for the kind of customary practices that seem too specific. But if, as the above passage does suggest, some customary practices have survived to become the norm and are then legalized despite breaking all four basic rules of the fiqh, it then remains to be seen whether they would nevertheless be fully incorporated in the canon and accepted as such. Would they even serve as future cases of analogy upon which similar opinions would be constructed? The remainder of the *risāla* will in fact ponder on this single issue: if, as it has often been stated that the "text is stronger than custom [*al-naṣṣ aqwa mina al-'urf*]" (2:116), how can the fiqh then accommodate customary practices that have already achieved the status of a de facto law?

In an unusual step, the remainder of the *risāla* shifts its interests from the abstract to more concrete, such as weights and measures, gold and silver, currencies, rent, taxes, and the status of land, all of which, in spite of the great changes to which they had been subjected in Ottoman times, did not have a thorough follow up in the fiqh literature. The general problem that establishes the dynamics between custom and the fiqh is as follows: "The sharī'a Text is stronger than custom, and the stronger should not be left in favor of the weaker. But if what the Text leaves out becomes taken over by the habits of people [*maḥmūl 'ala 'ādāt al-nās*], then a ruling is possible in their favor [*li-annahā dalālah 'ala jawāz ḥukm*]" (*ibid.*). For example, if people become acquainted "in selling money for money or giving loans based on [the] number [of monies (coins)] [*istiqrāḍ-ihā bi-l-'adad*], as in our time, this would be in conformity with the text" (*ibid.*), and judicial decision making should thus take such practices into consideration. The issue here, as before with the practice of *istiṣnā',* is giving an advance "loan" (*qarḍ*) in the form of a commodity (including money) and getting a refund whose value would be superior to that of the original commodity: such a practice would be a loan-with-interest (*ribā*) pure and simple. Even "exchanging money for money" with no interest is no simple matter due to possible fluctuations in gold and silver prices from one year to another and because of the variations in the

systems of weights and measures that often misleadingly carry the same name within different localities. Thus, for example, since the intrinsic value of most currencies was gradually decreasing, the weight of gold and silver contained in them was also decreasing; hence, a loan refunded years later by exactly the same amount—that is, the same *number* and *type* of coins—would be nominally the same but intrinsically less: obviously, in such a case, there would be no illegal act of *ribā* since the creditor lost and made no surplus from such a transaction. Ibn ʻĀbidīn, however, presents much historical evidence that points to the fact that changes in the intrinsic value of the same currencies that have been minted in different periods pushes individuals in many instances towards *ribā* practices, illegal customary practices that sharīʻa law would not possibly tolerate. In fact, such practices became so widespread that very few people were even aware of the illegality of many contractual forms, whether transactions, loans, credits, rents, and the like. Indeed, from the point of view of the fiqh, "all the contracts of our time are invalid [*jamīʻ ʻuqūd ahl hadhā al-zamān fāsida*]" (2:117) since the only way to achieve a valid purchase is knowledge of the "real value" of things (*miqdār al-thaman*): that would only be achieved "by imposing an adjustment [*musāwāt*] among the various weights and measurements" (2:118). More practically, however, what people should do is either opt for a transaction where the value of commodities is assessed in terms of the respective weights of currencies (particularly gold and silver) or their number. This is particularly helpful when payments stretch over long periods of time or when they do not coincide with the delivery of the purchased commodities.

Currencies, weights, and measures are all examples of an *ʻurf ʻāmm* type of custom since they cannot be restricted to a small locality. The point here is the association of the *variations* between currencies, weights, and measures with custom; that is to say, since the association of a "value" to a particular coin is an *arbitrary* step, which is more the outcome of practice than reason, it would only be the outcome of custom. This is especially true in societies where local currencies were still minted with gold and silver and where paper money was not common. Since there was a systematic devaluation of coins in terms of their respective gold or silver weights, Ibn ʻĀbidīn identifies as custom the association that social actors unconsciously *assume* between their formal and intrinsic values. Obviously, all such associations were wrong, illegal, and led to invalid contracts—from the point of view of Ḥanafī practice, of course. But what would the sharʻ do when confronted with massively established customary practices except request that some kind of order must be brought to them?

In the two examples discussed thus far, both of which operated on the distinction between private and public, the private custom was typically

conceived as too weak to be of any value to the fiqh, or, in other words, it would have been too much asking from Ḥanafī practice to recognize as legitimate all regionally accepted customs. Ibn ʿĀbidīn's *own* opinions, however, on these issues never seems clear cut. Thus, while accepting previous opinions on the primacy of text over custom, he did acknowledge—if not accept—*some* customs as a *fait accompli.* The whole question of custom vis-à-vis sharīʿa law would not have been that crucial in the first place had the latter posed itself as a socio-historical creation, as most modern systems of justice do, rather than as a religious (hence divine) and immutable entity tied to the formation of its madhāhib. Once a system of justice projects itself as a social and historical construction, it implicitly (or explicitly) accepts its codes and institutional foundations as relative to a specific historical period. In other words, what is yet to be coded, or the *lebenswelt* "outside" the codes and the system itself, is not perceived as "customary" anymore: from the complex institutional frameworks of society, and from the power-relations between classes, groups, individuals, etc., emerges sets of discursive and non-discursive practices that would establish the ground for new codes and legal practices. Societies with modern systems of justice that represent their own becomings as socio-historical typically tend to minimize the whole issue of "customary laws" as such in favor of state-enforced legislation: a practice is either legal or illegal, and if a non-legalized practice imposes itself and achieves the status of a quasi-law, it either has to originally fall within the domain of the customary, or else see its legality denied. Besides the socio-historical character of such systems, their formally abstract and systematic codes allow them to bypass the issue of dealing with social practices (or customs) on a one-to-one basis.

> It is indeed possible to narrow down [*takhṣīṣ*] a general or public custom [*ʿurf ʿāmm*] [to its specifics] when there is enough evidence that those issues [*masāʾil*] and the like had equivalent customs at the time of the first scholars [*mujtahid*s] from the Companions and on. Otherwise, it should remain general [and accepted as such], in a way similar to a local custom [*ʿurf khāṣṣ*] which is valid in one locality [*balda*] and which is what the majority of its inhabitants have practiced [*taʿāmala*] [for some time] whether it was old or new (2:123).

And few lines later,

> The idea of accepting [*iʿtibār*] the local custom of a single locality [as valid] came as an opinion [*qawl*] in the *madhhab;* [but this is a weak opinion] and a weak opinion would be worked [*ʿamal*] with when necessary (*ibid.*).

Ibn ʿĀbidīn might indeed have been paving his way for a reconciliation between the local and general customs, on the one hand, and Ḥanafī practice, on the other, but for what purposes exactly? All the arguments thus far, despite what looks like a tortuous path, are in fact coherent enough: 1) Ḥanafī practice

must remain the ultimate reference and should be taken into consideration whenever possible; 2) more specifically, the practice of the madhhab is stronger than custom; 3) when custom proves itself strong enough on particular issues and has adherents among a population, its acceptance by the fiqh depends on whether the two oppose each other or not; 4) there should be in principle no problem if they don't; 5) if they do, the first question to be asked is, Is this custom general (public) or local (private)?; 6) Ḥanafism favors a public over a private custom; 7) but in both cases we might end up with customs only marginally supported by the fiqh, in spite of weak opinions, unless there is a possibility of a narrowing down (*takhṣīṣ*) that would link—by analogy?—those customary practices to old ones from the time of the Prophet and his Companions. So, *takhṣīṣ* seems to be indeed the legal method that establishes, by means of *qiyās,* the link between a current custom to an old one. But what if, as in the majority of cases, such a connection could not be completed? The historical examples surveyed by Ibn ʿĀbidīn, covering both the general and local, are of primordial importance for the economies of these societies, and since many of them *seem* to be in direct confrontation with the fiqh, should they be simply taken as a *fait accompli* without being ever officially legitimized?

Besides the fact that both categories, the local and general, are of primordial importance to economy and society, the borderline that separates the two is not all too clear. Thus, in the *ʿāmm* were included currencies, weights, and measures, that is, all items that would not make sense if attached to a small locality only (a village or even a town would not survive with a currency of their own making); while various *ijāra* contracts, types of loans, and labor contracts such as the *istiṣnāʿ* were classified as *khāṣṣ* on the basis of their being rooted within a *single* community. Beyond that, the demarcation line does not play that well: how small should a "community" be to be singled out as a specific case? But the main question remains, what ought to be done with all those customs, since no satisfactory solution has come up yet? It is only in the second half of his *risāla* that Ibn ʿĀbidīn will open discussion up to those customs and "accept" them for their *historical necessity.*

He first states that independent and creative judgment, *ijtihād,* implies "knowing the habits of people" (2:123); and then plays with the notion of time (*zamān*) as an essential factor in explaining why opinions of *mujtahid*s sometimes differ from one period to the other on a single issue.

> For this reason, the learned men of the *madhhab* have often opposed what a *mujtahid* had decided on a particular issue, and whose opinion was related to his own time, because they assumed that had he lived in their own time, his opinion would have been like theirs, following the rules of the *madhhab* (*ibid.*).

Linking an opinion to the times that produced it will be the beginning of a "historicization" process that would eventually lead to accepting all kinds

of norms—whether Ḥanafī or customary practices—as relative to their own time and space. But the notion of "historical"—which is not denoted as such in the texts under examination—ought to be taken very restrictively—as an awareness of the restrictions that *time* as such imposes on an opinion, rather than, say, a conceptualization of the fiqh as an enterprise whose overall *meaning and significations* become obsolete as a totality because of their historical nature. We are confronted here, once more, with the overall nature of pre-modern discourses and the way they conceptualize their *praxis* in terms of a binding totemic past.

Once the process of ijtihād is itself "historicized," opinions of the canonical scholars would then have less weight on the present, and contemporary scholars would then adjudicate based on the needs of their *own* societies. That would give more room for jurists to validate customs that otherwise older opinions might have rejected. Such is simply stated the logic that emanates from the last section of the *risāla:* it begins to pave the way in explicating why it is sometimes necessary to forge different opinions from the canon. Thus, while mentioning a specific type of rent (*istījār*) over which the *'ulamā'* had been in disagreement with their three Ḥanafī founders, and over which they wanted a similar kind of treatment as for fasting, praying, and pilgrimage, Ibn ʿĀbidīn describes such differences in opinions as a "conflict of age [*ikhtilāf 'aṣr*]" rather than one of "argument and proof [*ḥujja wa burhān*]" (2:124). What fosters such differences is the fact that customs change in time, and, in turn, opinions of scholars are affected by such changes.

> Custom changes according to the transformations of the times. So when a new custom comes into being, should the muftī of our time give an opinion while assuming the validity of the latter even if it is in opposition to what is already established in the legal manuals? The same applies for a judge [*ḥākim*] who has to find his way out through presumptions [*qarā'in*]. (2:126)

This has been thus far Ibn ʿĀbidīn's clearest and most straightforward formulation of the problem; it also constitutes an additional intermediary step prior to establishing that new opinions, which were inconsistent with older ones, might have been the outcome of changes in the customs rather than an inconsistency in the line of arguments itself.

> You should know that the latecomers [*muta'akhkhirūn*] who opposed what was said in the manuals of the school on the previous questions, did so only because the times and customs have changed, and because they knew that had the founder of the school [*ṣāḥib al-madhhab*] lived in their times, he would have given an identical opinion to theirs (*ibid.*).

What was perceived at first hand as the "heretic" opinions of the latecomers, are now legitimate in accordance with changing times and customs. Custom

is pushing Ḥanafī practice towards a modification of many of its opinions, but there does not seem much movement the other way round. That the fiqh was gradually transformed by custom—even though Ibn ʿĀbidīn would argue that such changes were not *structural,* that is, they did not affect the substance of the fiqh but only "formalities" that were due to changing times—was indeed a major acknowledgment coming from a nineteenth-century faqīh. To my knowledge, none of his predecessors formulated it that openly. Still, several questions need to be answered before we determine how radical a statement it was. How did jurists and muftīs decide on "new" opinions? How did those new opinions relate to older ones, in particular the ones considered as "foundational"? And how did they affect the Ḥanafī school as a legal doctrine: Were the new opinions simply patched, or did they provoke a restructuring on some issues? Were new opinions *always* integrated into the legal corpus to catch up with emerging customs, or was the resolution to some customs left unanswered? Concrete historical examples need to supplement each answer, whenever possible. Overall, Ibn ʿĀbidīn seems unable to work out the relationship between custom and law with a set of abstract, rational, and coherent rules. Instead, he leaves a lot to *personal* independent judgment at the discretion of jurists, judges, and muftīs. Thus, in reply to the first question, How did muftīs decide on "new" opinions?, his answer seems to be typically focusing on the *individual* responsibility and knowledge of each muftī.

> The muftī who gives an opinion based on custom has to know well his own time and the lives of people, and whether the custom in question is general or local, and whether it contradicts the text in the first place. (2:127)

The muftī's "method" in deciding how to relate emerging customs with Ḥanafī practice in order to state an opinion based on his knowledge of his society, places him in a mindset with "casuistical questions," to use Kant's terminology of the *Metaphysics of Morals.* That implies that the questions can only be answered by careful thinking about a particular issue, and not just by deploying rules. Weber also thought—probably extending the Kantian argument to another domain—that many legal systems argue casuistically, that is, by providing probable and carefully thought answers on a case-by-case basis rather than through general legal rules (Weber shared similar views for the social sciences as well). For Weber, "casuistical logic" seems a necessity for any legal system; a serious structural problem emerges, however, when the system as a whole is unable to work through abstract rational rules and reasons casuistically for almost any issue.[56] In our case here, what needs to be analyzed

56. Weber's reliance on casuistry is the central focus of Stephen P. Turner & Regis A. Factor, *Max Weber: The Lawyer as Social Thinker* (London: Routledge, 1994).

is whether the "casuistical questions" that every muftī had to challenge were the outcome of necessary "consultations" that would have only been framed the way they were, or else produced by a system in crisis whose emerging opinions would no longer conform to the old precepts of the school.

In the passage above, besides the jurist's knowledge of his own society and customs, the main problem, prior to adventuring into producing an opinion, is to check whether the custom in question is general or local, and whether it is in conflict with sharī'a law. The distinction between general and local custom has been haunting the *risāla* from its beginning, but, thus far, what is to be accepted as legitimate remains uncertain at best. The only "rule" that has been established with certainty is when any custom, whether general or local, should be rejected by the legal system—that is, muftīs should not rule in its favor—when in (formal) contradiction with any text of the sharī'a: but even here, a muftī could accept it on the basis that it was a product of its own times. The other rule of thumb is that general customs are usually a stronger category than the local or private and thus have more chance of survival. Beyond that, even the main issue of determining the category of a custom—general or local—seems to follow no definite rule and is one more of those numerous "casuistical questions" left for the muftī (or jurist, or judge) to meditate upon. Is it therefore that important to differentiate between a general and local custom as long as they both seem in contradiction with sharī'a law? To Ibn 'Ābidīn the answer seems positive:

> A ruling based on a custom [*ḥukm al-'urf*] would show whether it is global or local. Thus, since a general custom is practiced all over [*sā'ir al-bilād:* in other localities], its ruling will also be applied to those people all over [living in other localities] [*ahl sā'ir al-bilād*]; as to a local or private custom, since it is specific to a locality, rulings [based on this type of custom] will be applied only to the people of that locality (2:130).

The presupposition here is that general and local customs are two different and distinct categories which are neither contained in one another, nor assume each other, nor overlap, so that even "a general ruling cannot stand firm (stabilize) upon a local custom [*al-ḥukm al-'āmm lā yathbut bi-l-'urf al-khāṣṣ*]" (*ibid.*). What in fact jurists would have liked to avoid is the possibility of rulings, based on local customs, that would eventually metamorphose into general rulings accepted in many courts all over; obviously, there is no problem vice versa. The main problem, however, remains the vagueness of the expression *sā'ir al-bilād,* which only denotes a large enough locality: but how "large," and what were "large" enough proportions from the standpoint of the fiqh? Like a muftī's personal knowledge and judgment on the customs of his own locality, "largeness" did not seem to follow a specific criteria and was therefore left to the discretion of scholars: "Muftīs and judges should not rule on a question

formally [*ẓāhir al-riwāya,* that is, based mainly on Ḥanafī *uṣūl*] and leave out custom" (2:131). But now that custom looks to be certainly unavoidable, what is it that would be identified as a customary law that a scholar would integrate, using his discretionary powers, into his judicial decision making?

When general or local customs seem at first hand to contradict Ḥanafī practice, they still ought to be examined carefully prior to discrediting them; the two categories, however, do not mix together, and a ruling based on a local custom should not become a general ruling. All this leaves plenty of room for muftīs and judges to maneuver, a step that could be described as casuistical questioning and reasoning. In fact, there seems to be two distinct and interrelated levels that make possible that kind of reasoning, that of *uṣūl,* on the one hand, and their *furūʿ*. General and local customs are indeed often in conflict with sharīʿa law, or more specifically with *uṣūl al-madhhab,* the foundations of a particular legal school. However, because muftīs and judges share a common power to accept a general or local custom, they created a parallel literature known as the *furūʿ,* or the positive legal rulings, which consists of the various *mutūn, shurūḥ,* and *fatāwā.* The *furūʿ* makes possible therefore the survival of all kinds of customs and their *textualization* into a body of texts. Indeed, in some respect, the *furūʿ* would be considered as the "historical textualization of customs."

> When a local or private custom is in conflict with the text of the legal school [*al-naṣṣ al-madhhabī*], which, in turn, is based [*manqūl*] on the founder of the school [*ṣāḥib al-madhhab*], then the custom in question would be accepted [*muʿtabar*] following [the opinions] of the scholars of the *mutūn, shurūḥ,* and *fatāwā* in the *furūʿ* which we have already mentioned (2:131).

The "original" customary *practice* is thus metamorphosed and buried, in the domain of the fiqh, within layers and layers of texts that constitute the essence of the *furūʿ*. This process of custom-textualization, besides establishing a "precedent" for a customary practice, also links a newly accepted custom with a *textualized precedent.* Thus, the whole domain of custom, which in essence belongs to what Pierre Bourdieu described as *le sens pratique,* is within Ḥanafī practice metamorphosed into something else: a legal set of texts, the *furūʿ,* which were parallel to the *uṣūl,* and which served as handbooks for the muftīs and judges to accommodate the newly emerging customs. Because each custom had to be matched with some textual precedent in the *furūʿ,* the reductive character of such an enterprise—the only legitimate one within the domain of the fiqh—needs to be questioned in terms of *what it leaves out* from those customary practices. But what if a custom has no precedent? Did the jurists ever *recognize* the existence of such customs?

The linguistic roots of custom

What should be of interest in the context of our discursive approach is Ibn ʻĀbidīn's crucial step in associating custom with language. This takes place at two levels. First, the association between a newly emerging custom and a textual precedent from the *furūʻ*; then, second, the problem of a *common language* essential not only in the daily lives of people, but also in the way commoners understand the law, how they interpret it when they draft wills, erect waqfs, or come to court as disputants, representatives, witnesses, plaintiffs, or defendants. In all such cases, common language acts like custom: it carries within it presuppositions, practices, and power-relations, all of which sharīʻa law would tend to perceive under a different eye. Indeed, Ibn ʻĀbidīn reasons in terms of a major difference (*ikhtilāf*) between "the commoners [*ʻawām*] and the professionals [*khawāṣ,* meaning the jurists]" (2:136) in terms of linguistic differences and perceptions. The last few pages of his *risāla,* which elaborates on those historical linguistic differences, is in fact the richest of the text.

Ibn ʻĀbidīn begins with the example of a woman who claimed that she purchased something from her husband. The majority of women and commoners (*ʻawām*) understood the sheer enjoyment (*istimtāʻ*) of what was allegedly purchased, and the satisfaction (*riḍā*) that resulted from it, as enough evidence in themselves that this property belonged in fact to that woman. From a legal point of view, however, such attitudes are valueless since they fail to prove any property (or other) rights. Evidence (*bayyina*) is needed to show that this was, say, transferred to her as a gift (*hiba*) or in some other way (2:133).

There is obviously a gap between the official language of the fiqh and the courts, on the one hand, and the common language of everyday life on the other. Thus, when people come to court, rather than adapt to the official legal language, their utterances would typically reflect their *own* understandings of what they were saying. What would end up as a gross misunderstanding operates in fact at two distinct levels. First, social actors using the legal system in order to draft a will, bequeath a waqf, or start a lawsuit, do so in a language they have been accustomed to and they find convenient. Because legal scholars are accustomed to their own scholarly and more generic language, they might misunderstand or reject "common statements" on the basis that they either constitute a violation to the law or that they do not fit within commonly accepted legal practices. Second, because the fiqh typically ignores such linguistic variations, opinions are usually drafted with an official legal language in mind. In short, language operates in a way very similar—if not identical—to custom—we would indeed even speak of *customary language* as a level that is corollary to *customary practices*. In fact, practices would

have a linguistic foundation of some sort without, however, being limited to the linguistic. Practices could be symbolic, bodily, or both. For example, the *istiṣnā'* custom considered earlier was a case that involved a customary practice similar to the lending of money with interest: it was indeed a labor contract where the laborer would have to pay a surplus for the advance credit he received. Since this type of labor contract was based on a "linguistic understanding" of some sort (modes of payments, advances in kind or cash, etc.), the practice of *istiṣnā'* becomes indistinguishable from the language of the community that made it possible. But there might also be signs, symbols, images, or representations accepted in a locality, which in essence are not linguistic, and whose assimilation into a legal corpus would be even more challenging.

The overall assumption here is that language plays a fundamental role in the power-relations between customs and the fiqh—each level trying to impose its own standards. That was fairly obvious in the attempt of the fiqh to accommodate customary practices as part of its *furū'* and create a "precedent" for them; but despite the fact that the linguistic ambiguities of those practices were absorbed and normalized within a more standard language, the issue of what an interlocutor really meant to say remains an essential problem among the long list of "casuistical questions" to be posed by muftīs, judges, and other legal scholars.

> Arabic language [*kalām*] in its various dialects [*lughāt*][57] serves the purpose of agreeing among and talking to one another [*tafāhum wa takhāṭub*], and undoubtedly, each interlocutor intends the meaning of his own dialect [*yaqṣud madlūl lughati-hi*] so that his utterances assume that dialect [*yaḥmul kalāmu-hu 'alayhā*],[58] even if it is in conflict with the dialect of the *ḥākim* and judge in terms of its purpose [*qaṣd*]. (2:136)

In some respects, this view is close to some linguistic approaches common in the social sciences today, namely, the dialectical relationship between *langue* versus *parole,* or *lugha* and *kalām.* In fact, even though Ibn 'Ābidīn's use of *lugha* and *kalām* is confusing at this stage—*kalām* is used both as a regional

57. If we understand by *kalām* the way individuals use a particular language at a particular moment, and *lugha* as the more abstract linguistic system, which by definition belongs to a collectivity, then the use of *kalām* with respect to the Arabic language is definitely misleading. Indeed, *al-lugha al-'arabiyya* would have been more correct since it would denote the idea of a complete linguistic and collective system, while *kalām* should be limited to the various regional and individual dialects. Thus, *lugha* is an equivalent to *langue,* while *kalām* is closer to *parole.* The fact that Ibn 'Ābidīn either reverses his use of *lugha* and *kalām,* or does so interchangeably, is in my view more an indication of an unfortunate use of words than a conceptual tool.

58. The utterances of an interlocutor are here described as *kalām,* which is correct, but that renders *kalām* for the "Arabic language" improper.

dialect and a source for Arabic language—the intention is nevertheless to differentiate between the official Arabic language (*lugha*), on the one hand, and the various regional and individual dialects (*kalām*), on the other. The point here is that the various individual and regional dialects are always in a process of becoming, and they thus might create confusion and misunderstanding in their daily use. Hence customs, in a way similar to vernacular languages, are subject to the same linguistic fluctuations and thus pose a problem in the process of judicial decision making. The jurist by contrast drafts opinions to be associated with the more general and discursive logic of his own madhhab: in other words, if the jurist's opinions are part of a collectively structured *lugha,* regional dialects, customs, and individual communications are all based on *kalām,* or a speech whose modification into a more structured discursive language like the fiqh involves a long historical process. So, when a judge is engaged in the decision-making process, should his decision take into consideration all such variations in speech, and what would the usefulness of such a step be? It should be noted that the judge himself possesses a *kalām* of his own, at least one that is yet to become part of the larger corpus of the fiqh, in particular if that judge intends to be a mujtahid and his opinions accepted by a wider audience. So, put simply, the fiqh is unable to ignore all such vernacular and idiomatic variations, and it has always had to assimilate them in its various *furū'*.

The other fundamental aspect, at least from the viewpoint of speech-act theory, is that oral utterances, unlike written statements, are not divided on a true-false basis. This comes from the *performative* nature of every utterance—hence the term *performative utterances:* social actors do not simply transmit information to their interlocutors, but also to convince, dramatize, lie, deceive, make promises, etc. Thus, an utterance, with what apparently looks like one meaning attached to it, generally manifests much more ambiguity at the performative level.

Ibn 'Ābidīn's language game is close, in some respects, to what Austin had in mind with his "speech acts":[59] that one must never look at what an utterance has to say at face value—that is, in its presupposed formal meaning—but only in association with the performance that ends up constituting its most essential aspect. Ibn 'Ābidīn certainly did not argue in terms of performative utterances, but his notion of "customary language" was close to it. The language which he had in mind, and which at times was in direct conflict with the fiqh, is one learned by custom; and since learning a language by custom does not simply imply words, sentences, and syntax rules, but, more importantly, how

59. On the significance of speech-act theory in reading sharī'a texts, or more generally legal texts and court cases, see *infra* Chapter 8.

to use them effectively as a resource for one's status and interaction with others, "customary language" is certainly above all performative by nature. Even though Ibn ʿĀbidīn's notion of custom—in the broad sense of the term—seems to have been restricted in everything we have encountered thus far to what is *accepted* by a "community" and to what its elders transmit as custom, or to what the *furūʿ* literature has assimilated of the latter and brought to discourse, in short, to *customary law* that would act as a parallel institution to Ḥanafī practice, it is still a big and major step to associate custom with the intricacies of language. Judicial interpretation is thus meaningless without its *"sens évolutif,"*[60] or how concepts and notions come to be re-interpreted based on their present meaning rather than what the ancestors had in mind.

Speaking, for example, of the drafting of waqf documents, Ibn ʿĀbidīn maintains that,

> the propositions [*ʿibārāt*] chosen by the founders of the waqfs [in their waqfiyyas] are neither necessarily based on the foundations of the fiqh, nor on those of the Arabic language, as maintained by imām Bulqīnī in his fatāwā, but only on the way [those propositions] are articulated and understood in custom, and on what is close to the founders' intentions and habits. (2:144)

Bulqīnī[61] had ruled in a *risāla* ("al-Risāla al-marḍiyya fī-l-farīḍa al-sharʿiyya") that when the founder of a waqf explicitly stated in the written act that "the revenues should be distributed among my children [*awlād*] and descendants [*dhurriya*] according to sharīʿa law [*ʿala al-farīḍa al-sharʿiyya*]," that implied, from Bulqīnī's point of view, that revenues should be distributed equally among all males and females. His logic was based on an opinion by Abū Yūsuf who, in turn, based his on a ḥadīth stating that the revenues or donations (*ʿaṭiyya*) should always be distributed on an equal and fair basis (*al-ʿadl wa-l-taswiya*) among all males and females. Thus, among the main representatives of the

60. "The President of the highest French Court, M. Ballot-Beaupré, explained a few years ago, that the provisions of the Napoleonic legislation had been adapted to modern conditions by a judicial interpretation in *'le sens évolutif.'* 'We do not inquire,' he said, 'what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be'" (Munroe Smith, "Jurisprudence," 29-30, quoted in, Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 84). "It follows from all this that the interpretation of a statute must by no means of necessity remain the same forever. To speak of an exclusively correct interpretation, one which would be the true meaning of the statute from the beginning to the end of its days, is altogether erroneous" (Kohler, "Interpretation of Law," 192, quoted in Cardozo, *Nature,* 85). Cardozo himself, who endorsed such "evolutionary interpretations" of the law, describes his own method as "the method of sociology" (see in particular Lecture III in *Nature*), on the basis that "the judge as legislator" must have a "sociological" knowledge of the society in question, which is a bit unfortunate considering that what is above all needed is an historical-hermeneutical approach to texts and sources that would be primarily concerned in the reconstruction of their historical meanings prior to adapting them to modern needs and circumstances.

61. Ruslān b. Abī Bakr al-Bulqīnī (d. 756/1355), Egyptian faqīh.

Ḥanafī school, the idea was that regarding donations, gifts, revenues, and the like, the distribution among males and females should be on an equal basis, that is, for all categories of money and property transfers that exclude direct inheritance, the well-known rules of inheritance in Islam—males should inherit twice as much as the females—should *not* be followed. However, and despite the official precepts of the Ḥanafīs that opted for a distribution on an equal basis, customary practices—at least in the area of Bilād al-Shām—imposed a different order by applying the same rules of inheritance to matters related to the distribution of revenues among descendants. Thus, it became indeed a well-known practice to give men twice the shares of the females when it came to distributing the revenues of a waqf. Ibn ʿĀbidīn notes that even though such practices were well-known to muftīs and judges, some still insisted that the expression "according to sharīʿa law," as stated in an act of a waqf, should be applied according to Ḥanafī practice, that is, equality between the sexes, his own ijtihād on that matter favors an interpretation based on the accepted customs of those localities: *li-l-dhakar mithla ḥaẓẓ al-unthayayn.* Indeed, for the period under study, Ibn ʿĀbidīn's opinion seems to have been the prevailing one. In all the waqf cases covered in this study (Chapters 6 & 8 *infra*), the distribution of revenues was on an unequal basis among all beneficiaries.

The acceptance of such customary practices is a sign that what matters, in the final analysis, is *how language operates as custom:* judges should thus read, say, a waqfiyya based on how statements and propositions made sense to the founder herself, that is, relative to the everyday language of her community. The privilege given to the process of *language contextualization*—with custom itself operating as a quasi-"context"—even pushed some jurists into accepting *oral* formulations as more "genuine" than their written counterparts. Thus, for example, in one of the cases analyzed below (C 8-1), the judge, basing himself on an opinion by Ibn Nujaym, accepted the oral alterations that the founder added later to his written waqfiyya, on the basis that the final ruling should follow "what the founder has said and not what was drafted in the waqfiyya." It indeed all amounts to that notion of "customary language" (or linguistic custom) which is by definition oral, and, at one point, Ibn ʿĀbidīn goes as far as to suggest that each utterance or statement should be taken individually, that is, relative to the utterer: "The statements [*kalām*] of the founder of a waqf should be contextualized [*ḥaml al-kalām*] according to his own knowledge of things [*mā huwa al-maʿrūf ʿinda-hu*], and according to what he himself intended in his statements" (2:144); and: "It is our duty to accept the dialect [*kalām*] of each person making a contract [*ʿāqid*] in the context of his own habits, even if it opposed the language [*lugha*] of the Arabs and that of the sharīʿa" (*ibid.*). Even though the distinction between *kalām* and *lugha* (which,

in this case, is accurately used and clarifies the confusion of the previous passage) is reminiscent in many ways of the tension that modern linguistic theories perceive between *langue* and *parole,* or the spoken and written in any language, the question as to why such a distinction is useful to legal doctrine is yet to be forcefully articulated.

Pursuing his inquiry regarding the unequal distribution of a waqf's revenues among its beneficiaries, Ibn ʻĀbidīn notes that what sharīʻa law prescribes for inheritance is the principle of *mufāḍala,* that is, differentiation between the sexes: "Differentiation is a basic rule in the domain of inheritance [*bāb al-mīrāth*]" (*ibid.*), but what custom does is to (wrongly) transfer such a principle to the domain of the waqf, even though, ironically, the majority of jurists were against it. Those who therefore push for "equality (*taswiya*)" between the sexes in the domain of the waqf should realize that they are favoring an idea that is "disliked" (*makrūh*) in the sharīʻa. But since "the meaning of [the expression] *farīḍa shar'iyya* implies differentiation rather than hate" (*ibid.*), then by transferring such a principle to the domain of the waqf, we in fact fully satisfy both the sharīʻa and custom.

As our discussion in Chapter 4 shows, the basic precepts in Ḥanafī practice regarding land, property, rent, and taxes had a poor following in Ottoman times. Worse still, Ḥanafī doctrine lagged behind and did not have much to say on the new contractual forms that were necessary for the long survival of the iltizām and mīrī system (not to mention its predecessor, the *timār-sipāhī* system). Classical Ḥanafī doctrine prescribed that the two main "taxes" of *'ushr* and *kharāj* were to be imposed on private lands only. Indeed, the "rent contract (*'aqd ijāra*)" between the owner and the tenant-farmer assumes that the proprietor was in full possession of his property, and the contract itself is a sign that the land was *milk.* It was also established from the beginning, since this was one of Abū Ḥanīfa's opinions, that the taxes of ʻushr and kharāj should be paid by the lessor (*mu'ajjir*). So, in this early system, the lessee paid a rent (*ujra*) to the proprietor for using the land, and the latter, in turn, extracted from the "rent" he received from the tenant-farmer the "taxes" of ʻushr or kharāj (in principle, it should be one or the other, but it could also be both) to be paid to the state.

In his concluding statements, Ibn ʻĀbidīn describes very well the changes that this system had been subjected to in Ottoman times. The main transformation came from the fact that most rural lands became state owned, that is, *mīrī* (even though he seldom uses this term). When the state became the main proprietor, the classical distinction between "rent" and "tax" faded away, and what the treasury of the state was extracting from the peasantry—through its *multazim* class—was the "rent" as such. Moreover, it was unclear what the classical "taxes" of ʻushr and kharāj meant in this context; thus while kharāj

was almost totally dropped as a term in the sharī'a courts and the *majālis* records of the Tanẓīmāt, the 'ushr was kept in conjunction with the mīrī (or *māl mīrī*); but it remains unclear, since the fuqahā' never dealt with the issue, what the difference between the two was. Before we move to what Ibn 'Ābidīn has to say on the most delicate issue facing the Empire (since land was the major source of wealth), it should be noted that the fuqahā' used a different kind of terminology from the one of the courts and the majālis:[62] basically, they kept discussing systems—the 'ushr and kharāj—which ceased to exist a long time ago, at least in their initial connotations. What did the 'ushr then mean when it was extracted on mīrī lands?

Ibn 'Ābidīn's main preoccupation in his concluding remarks was on who should pay the 'ushr: the tenant or the lessor? Obviously, from the standpoint of classical Ḥanafī doctrine, the 'ushr should have been paid by the lessor since it was considered a "tax" on the "rent" (*ujra*) paid by the tenant to the proprietor. But in the Ottoman system, whoever might have been the lessor, he often ended with little revenues due to the fact that the state extracted most of the "rent" from the peasants or tenant-farmers. The complaint was therefore about the fact that "it became a custom in our times to extract the 'ushr from the tenant [*musta'jir*] rather than the lessor" (2:140). He then traces back the rule of "the tenant rather than the lessor [*al-musta'jir duna al-mu'ajjir*]" to Abū Ḥanīfa's two disciples who did not agree with their master's opinion that only the lessor should pay. Others, such as Khaṣṣāf and Qāḍīkhān, among the early Ḥanafites, followed the rule too; and there were even more that endorsed it generations later, such as Ramlī and 'Imādī. Ibn 'Ābidīn then muses upon the implications of such an "event" (*ḥāditha*)—meaning, forcing the tenant to pay the 'ushr—for his own time.

> Should the imām reveal the truth [about the payment of the 'ushr], a great damage would ensue on the waqfs and other types [of properties] that no one would dare to speak about. This is because it became a custom in our time that the owners [*aṣḥāb*] of the *timār* and the *zu'amā'* [*ze'āmet*][63] who are the agents [*wukalā'*] of the sultan,[64] God renders him victorious, extract both the 'ushr and kharāj from the tenants [*musta'jir-ūn*]. And it also became a habit that the political class [*ḥukkām al-siyāsa*][65] to receive the dues [*gharāmāt*] extracted [*wārida*] from the tenants' lands. Since the majority of the villages and farms [*mazāri'*] are waqfs, the tenant, because of what we have just said, can lease

62. For a discussion of those differences, see Chapter 4.

63. Since there were not that many *timār*s and *ze'āmet*s left over by the first half of the nineteenth century (in fact that system became obsolete by the late seventeenth century), Ibn 'Ābidīn must have most probably implied the *mīrī-iltizām* system.

64. Probably implying the multazims as a group.

65. Probably implying the a'yān-multazims class.

> [*yasta'jir*] the land with a small rent [*ujra*] only. It could be a big village whose rent [should in principle have been] more than a thousand dirhams, but it is rented for, say, only twenty dirhams, and this, because of what the political class extracts from [the tenant] in terms of the many dues [and the like], and because of what the owners of the *timār*s extract, in turn, from him. So if the administrator [*mutawallī*] [of the waqf] leases [*ājara*] this village for twenty dirhams, is it permissible for anyone to issue a fatwā requesting that the administrator [of the waqf] pays one-tenth [*'ushr*] of what the village has produced [considering how low the rent is]? This is something that no one would accept (*ibid.*).

What makes this passage and many others[66] opaque and confusing is Ibn ʿĀbidīn's insistence in using a different terminology from the one commonly accepted in court records and official documents, and in not naming things by their name. To begin, the nineteenth-century land tenure system unanimously referred to was the *iltizām,* and the *multazim*s were the state-appointed agents (in principle to the highest bidder of the fiscal unit in question) who extracted the "rent"—that is, the *māl mīrī*—from the peasantry. In many cases, however, those multazims were from the *aʿyān* status group to the point that it would be safer to describe them as a combined *aʿyān-multazim*s group appointed to extract the mīrī. Because land was *formally* state-owned, the *aʿyān-multazim*s did not own the lands they were granted, and thus the peasant-farmers could not possibly have been their "tenants." They were not the state's tenants either. Actually, the whole system was one of corvée labor where the peasants enjoyed no "contract," and were extracted most of their produce. The multazims were the ones appointed to extract this produce, kept part of it for their own expenses, and gave the rest to the state. The old *timār* and *zeʿāmet* system had mostly disappeared by the nineteenth century and fiscal units with life-time appointments were known as *mālikāne,* which, in turn, basically shared the same fundamental fiscal principles as the iltizām. Only those who owned lands as private properties (*milk*) were able to lease them to tenant-farmers. It remains to be seen, however, what kind of "rent" those proprietors would have imposed in a system dominated by the "low rents" of the mīrī and waqf.

Knowing what the system really was, it is surprising to see Ibn ʿĀbidīn avoiding the most common terminology of the period to denote objects, groups, contractual relations, and processes. Instead, he creates a confusion by talking about the *timār* and *zeʿāmet* as if they were nineteenth-century notions, while *iltizām, multazim,* and *mīrī* are surprisingly never mentioned; instead, he was more satisfied with euphemisms like the *ḥukkām al-siyāsa* and the *gharāmāt* they imposed. Focusing then on the waqfs, since those represented, according

66. For similar passages on land tenure, see Chapter 4 below.

to him, the majority of the rural lands, he notes the impossibility of charging the ‘ushr on the lessor (that is, the beneficiaries of the waqf, represented by the administrator) because the rents were much lower than what they ought to be. The reason why the lessor received so little in rent was quite obvious: by the time the “tenant” paid his “rent” to the administrator of the waqf, he had very little left after the multazim extracted from him the mīrī dues. As a matter of fact, the mīrī turned out to be the minimum since the state required additional “impositions” in kind from the peasantry, not to mention that multazims in general did their best to extract as much as they could. What the lessor ended up with was a minimal sum that could hardly be described as a “rent”; he therefore paid no ‘ushr, which was extracted from the peasantry through the state-appointed multazims. Hence both the ‘ushr and mīrī, as a combined sum (and assuming they coexisted over a single fiscal unit), were the real “rent.” This “rent” was what the state could extract: that makes sense since the state was the sole proprietor in the majority of cases. As to the claim that the waqf was the most common form of property, it remains to be seen where and when was this so. At any rate, the fact that the waqfs’ beneficiaries were paid very low rents was probably a sign that both waqf (at least family waqfs) and mīrī were practically the same in terms of the mīrī and ‘ushr dues to be extracted. Indeed, the same multazim could be assigned a fiscal unit that had both types of lands.

From customs to fatwas and beyond

A familiarity with the legal history of the Ottoman period reveals that the consolidation of custom as a source of legal change began with Ibn Nujaym’s *Ashbāh,* and achieved its ultimate formulation in Ibn ‘Ābidīn’s *Rasā’il.* Ibn Nujaym’s prime example of a custom-cum-law, the *khulū,* has become standard in Ḥanafī literature:

> A fatwā should make it clear that the *khulū* which is imposed in some of Cairo’s sūqs on the shops [*ḥawānīt*] is necessary [*lāzim*], and that khulū gives a right [to the tenant] for keeping the shop; to the point that the owner [*ṣāḥib*] has no right to evict him [*ikhrāj*] or to rent it to someone else, even if it were a waqf.[67]

A customary practice establishes itself within a community with a certain “legal validity” to the point that the muftī is pushed to drafting a fatwā acknowledging the custom-cum-law: it thus becomes textualized and moves around to other

67. Ibn Nujaym, *al-Ashbāh,* 114.

localities on this basis, and jurists would typically attempt to rationalize the existence of this newcomer on the basis that it originated in custom. But where laws do originate from is always uncertain, and a rationalization constructed in hindsight only serves to legitimize the existence of new norms: in fact, a norm imposed by sultanic legislation, such as the *mīrī-iltizām* system, would be by all means legitimized as custom, and hence accepted as such.

Only judicial decision making, therefore, creates a process whereby a custom would become law. To think otherwise would imply that customs in general share an inherent (or autonomous) process on their own where by *opinio necessitatis* "the persons involved purposely follow a certain rule because they believe that it is a rule of law," so that a "general conviction of law" is achieved.[68] But a problem would immediately pose itself when attempting to explicate how a custom-cum-law gets accepted, is remembered, then falls into desuetude, and then is replaced by a new customary law. The missing link here is judicial decision making, and custom becoming law by virtue of an adjudicative process, either through the fiqh or the sharī'a courts. That's why Ibn 'Ābidīn's *risāla* gradually moves towards the containment of custom within the sphere of language and discourse: once formulated as *parole,* the customary law is then situated within the broader discourse of the fiqh, and thus achieves the status of a normative rule.

Ibn Nujaym had precisely such difficulties about custom in mind when he formulated what he called the "general rules (*al-qawā'id al-kulliya*)" of the Ḥanafī fiqh. Such "rules" could in fact be looked upon as another historical attempt for a reworking of the Ḥanafī *uṣūl* as originally established in the *ẓāhir al-riwāya*'s six manuals. A "rule" is by definition general, and its purpose is to bring the *furū'* together under a new set of principles so that even things that might have been disconnected in the first place between the *'ibādāt* and *mu'āmalāt* might be coherently brought together under, say, the notion of "intention," or *niyya.* Rules would also give the opportunity for jurists, judges, and muftīs to exercise their own independent judgment when dealing, as they often do, with a specific question, so that knowledge of the "general rules" and their application "would enable a jurist to rise to the status of mujtahid even while drafting a fatwā."[69] Surprisingly, though, the only other attempt to define those "general rules" since Ibn Nujaym's *Ashbāh* was the first chapter of the Majalla.

The Majalla was the Ottoman bureaucracy's last attempt to save the Ḥanafī fiqh from desuetude. The first one-hundred articles were either taken word-for-word or adapted from Ibn Nujaym's *al-Ashbāh;* and so was article 36 on

68. Watson, *Evolution,* 45.

69. Ibn Nujaym, *Ashbāh,* 10.

custom (or habit): "al-ʻĀda muḥakkama ("Custom has the status of law")." One of the most authoritative *sharḥ* (explanation or interpretation) of the Majalla, that of ʻAlī Ḥaydar, explains *muḥakkama* as "the reference [*marjaʻ*] which is taken into consideration upon conflict [*nizāʻ*] because it is considered as evidence [*dalīl*] upon which a ruling is based [*yubana ʻalayhī al-ḥukm*]; and this is based on the ḥadīth ʻWhat the Muslims see as accepted [*ḥasan*] is also accepted by God.'" The *sharḥ* then repeats—often verbatim—what Ibn ʻĀbidīn's *risāla* already exhaustively discussed: the parallel between *ʻurf* and *ʻāda* in terms of "repetition" and "what is accepted by normal souls [*al-ṭibāʻ al-salīma*]." But the "interpretive" text of the Majalla becomes more interesting and forceful once it moves from routine definitions to an elaboration of the most controversial issue—that of the relation between "text" (*naṣṣ*) and custom. The notion of "text" in the Majalla is in fact neither limited to scriptural nor the fiqh texts; indeed, it accepts *naṣṣ* in its broad meaning. The broadest would be *naṣṣ* as we understand it today: any written document or manuscript is a text; a second narrower meaning would have it close to *matn,* meaning the wording or text of an author; finally, there is text as *ḥukm* or *sharṭ:* provision, stipulation, term, proviso, or clause. The general rule here is that "custom and habit become in themselves a ruling to lay down a foundation for a legal ruling [*ḥukman li-ithbāt al-ḥukm al-sharʻī*] in particular when there is no equivalent of a text to proceed with the ruling. If there is a text, then it should be followed; and the text should not be dropped in favor of the habit [habit and custom seem to be used interchangeably] because the believers do not have the right to modify texts. And the text is stronger than custom because the latter could be based on something false [*bāṭil*] [...]" (1:40).[70] Thus far, text is considered in its strong connotation of *naṣṣ al-shāriʻ,* meaning "the Text of the legislator," or the sharīʻa texts. This kind of Text is "stronger" than any custom. Such an assertion seems to be quite straightforward and easy to follow as a rule, yet in practice we have already encountered several historical examples, such as *istiṣnāʻ, khulū,* and *ʻushr,* where the authority of traditional texts has been challenged if not bypassed altogether, thus creating a confusion among several generations of jurists before the custom in question became officially accepted—a "consensus" among leading jurists (even though it would have already been approved as a *ḥukm* in the courts).

But in what seems to be a broad consensus on texts conflicting with custom or vice versa, the Majalla opts for Abū Yūsuf's opinion: "When text and custom are in conflict, it should be seen whether the text is based on custom and habit or not" (*ibid.*). That is, "when the text is based on custom

70. All in-text page numbers in this concluding section refer to Ḥaydar's *Durar,* vol. 1.

and habit, the reference is habit while the text is left out. And when the text is not based on custom and habit, the reference is the text while the habit has no value." Of the two propositions, the first seems the strangest: drop a text in favor of an "equivalent" habit? And how can a text be "based" on custom and habit? Let us suppose for the sake of clarity that a legal text was created for an existing custom: since the custom *preceded* the text and made its existence possible, why should custom become the "reference" in lieu of the text? That's more understandable when the reverse takes place: a custom turned out to be in conflict with a pre-existing text—the text becomes an *ipso facto* reference. The two propositions seem indeed to contradict each other: in the second assertion the text is sacralized and kept despite the existence of customs and habits necessary for the survival of a society; while in the first, a text is dropped in favor of the custom upon which it was supposedly "rooted." (The ambiguity is caused by this "rootedness" (*mabnī*): how could a text be "rooted" in a custom?) Sensing these contradictions, or rather the possibility of misinterpretation, the *sharḥ* of ʿAlī Ḥaydar adds a cautionary remark:

> This does not mean that what imām Abū Yūsuf is implying is to forgo the text and work [*ʿamal*] with custom and habit, because, without any doubt [*min ghayr shubha*], the text is stronger than custom and habit, [and this applies] even to the text which comes from ordinary people [*yaṣdur mina al-nās:* that originates from individuals]; [what he meant] in his opinion was something close to interpreting the text [*raʾya-hu bi-mathābat taʾwīl li-l-naṣṣ*].

Then follows an example:

> When food is placed in front of a guest according to custom and habit, he would then be permitted to eat from this food. But if the host forbids his guest to eat, he would have then uttered a text [*ṣadara min-hu naṣṣ*] in opposition to the accepted custom and habit, and the guest will have to respect the text by not approaching the food and by forgoing custom and habit. If he eats, he would be acting against the text (40).

Here text is taken very broadly—not even restricting it to a *written* text—as anything that would be uttered by any individual in the form of an order, provision, or stipulation. It is not clear, however, how such an example clarifies Abū Yūsuf's "rules" since this was a case of a stipulation privately uttered among two individuals and should have no legal consequences: the example only proves that the text—any text—is "stronger" than custom. But what would then be an example of a text dropped in favor of a custom? This seems to be the question around which the discourse on custom is turning around with no satisfying answer. But the only solution is to assume that once custom has metamorphosed into law, it will at some point be integrated into

the *furū‘* literature, hence become textualized, and the older text, if any, will be forgotten. The point here is that only judicial decision making inaugurates a custom into law and thus transforms it into a written text.

The *sharḥ* then proceeds with all the distinctions already encountered in Ibn ‘Ābidīn’s *risāla:* the private and public, and the practical and verbal. Several Majalla articles are in fact based on such distinctions. For example, article 230 states that the items normally included in an act of buying are so without being identified. Thus, when a house was purchased, say, in Cairo, a city where houses were on several floors, the stairs were normally included in the act of purchase without, however, an explicit mention. Article 576 states that when a custom in a specific locality imposes selling on the basis of several installments, then the contract should be according to that custom. In short, what those texts are saying is that written contractual documents (or orally established contracts for that matter) would not have possibly stated everything *explicitly* since their textuality was framed by the customs and habits which they never identified as such but always presupposed.

The following article—37—states that “When people make use of something, it becomes a proof that should be taken into consideration [*isti‘m āl al-nās ḥujja yajib al-‘amal bihā*].” When people become accustomed to a custom, its repetitive nature grants it the status of a *ḥujja,* that is, as “evidence” that the custom is legally valid. Generally, we are told, the occupation (*waḍ‘ yad*) of a territory over a long period of time, and its possession (*taṣarruf*), are by themselves objective signs of full property (*dalīl ‘ala al-milk ẓāhir-an*) (1:41). Again, as before, customs follow the public-private division, meaning that everything is rooted in a locality, and a customary practice would end up accepted more generally only when its acknowledgment goes beyond that particular locality. The above assertion, which is part of the *sharḥ* text that a *waḍ‘ yad* represents as such an “external indication” for a vested right in the property, will be discussed in more detail later in conjunction with land tenure (Chapter 4 *infra*). Let me note very briefly that many of the cases discussed in the chapters below involve what might be labeled the hands-on and hands-off (*waḍ‘ yad* and *raf‘ yad*) procedural fiction (Chapter 5 *infra*). The simplicity of that legal technique contributed in its ubiquitousness in the sharī‘a courts: the plaintiff would claim that the defendant had illegally occupied and used his property for a period of time, while the latter would make the counter-claim that he had purchased it “for a known sum,” which remains unspecified (together with the alleged date of purchase), and since the plaintiff is unable to furnish any evidence regarding his alleged property rights, the judge would declare the property as the milk of the defendant. Add to this that plaintiff and defendant were in the majority of our cases closely related, meaning agnates from the same family as close as husband and wife, father and son (or daughter), and

mother and daughter (or son). The purpose of such procedural fictions was to create contractual settlements that would be hard to revoke, and which in turn would consolidate specific property rights.[71] The point here is that whenever Ḥanafism attempted to assimilate a practice that does not fit all too well with its corpus, it relegated it to custom and thus the textualization of the customary practice was self-legitimized on this basis. Judicial decision making was what usually did the trick: either in the form of procedural fictions (such as the *waḍ' yad* technique), or in fatwās that accepted those new tenancy contractual forms (such as the *marṣad, khulū, gedik,* and sharecropping contracts). Remarkably, all this movement did not much affect the rationalization of substantive law itself: all those new contractual forms were worked out on the top of a law of sale and tenancy that basically remained untouched. Which is precisely what custom was supposed to contribute to Ḥanafī practice: let it accept what a rigid law of sale would not, while leaving that law unchanged.

In its simplest form, the relationship between custom and text boiled down, in the final analysis, to two basic rules. First, custom enjoys the status of a legal *ḥujja* as long as it is not in opposition to a text from one of the contracting parties—text is here understood very broadly as denoting any statement or utterance by *any* person involved in some kind of contractual relation (and not simply the legislator, *shāri'*). Thus, for example, when a person hires someone for so many hours a day, both should then follow the number of hours specified in the text of the contract rather than what custom, within their locality, prescribes. If the contract gives no specifications, then custom should be followed, hence the saying that "text is more forceful than custom." The same rule should obviously apply whenever the text in question is derived from the fiqh. As to the second rule, it is concerned with the possibility of adopting a custom *despite* the existence of a contradictory text. This is indeed possible whenever the text is "based" on a custom. Thus, for example, a well-known ḥadīth classifies gold and silver as objects characterized by their weight (*mawzūn*) rather than number, while barley is based on the *kayl,* that is, number. The Majalla claims that since there has been a reversal in the way such objects are measured, custom should therefore be here the prime reference. Such an attitude went well with Abū Yūsuf's opinion on "when not to adopt the text" and against Abū Ḥanīfa and Shaybānī who gave privilege to the text under any condition.

71. See *infra* Chapter 3 on contracts and obligations.

Table 1-2
Text, custom, or both?

	Either Text	Or custom	Basis for a legal ḥujja
1	No text available	Available custom	custom
2	Text available	No custom	Text
	Both text and custom available		
3	Custom and text in harmony		either one
4	Custom in contradiction with text:		
4a	If the reference is a sharī'a text not based on custom		Text
4b	If sharī'a text is based on custom		possibility of adopting custom whenever it has crucially changed (Abū Yūsuf's opinion)
4c	If any (contractual) text opposes custom		Text

Out of all seven possible combinations, the first is indeed the most unusual since many customs became *de facto* laws because of the silence of the fiqh on many issues—or at least its inability to give satisfactory answers on issues raised in the past, with a set of followed opinions, but which had not been readapted to the realities of the times. One such example—and certainly the most crucial for Ottoman times—concerns the laws related to land, tax, and rent. Because the fiqh never confronted the Ottoman land tenure system and the massive state ownership openly, and felt comfortable with the classical obsolete notions of the *'ushr* and *kharāj* without thinking much about the new contractual forms that emerged out of the *mīrī-iltizām* system, laws had to supplemented from all kinds of sources, whether custom, or sultanic legislation in all its forms, not to mention the adjudication of the sharī'a courts and the regional councils. But in all this, Ḥanafism was disappointing in that it never attempted to present the theoretical cohesion that the system needed (see Chapter 4 *infra*).

The other source of change, according to the Majalla, is when a sharī'a text is "based" on custom. Because customs change over time, so do the sharī'a laws related to them (article 39). One of the examples provided in the *sharḥ* applies to witnessing. Abū Ḥanīfa made no requirements concerning the "recommendation" (*tazkiya*) of witnesses in a money litigation unless there was a challenge (*ṭa'n*) from the other party. His disciples, however, "who lived in times when the ethical standards became corrupted" (1:43), required recommending the witnesses; and the Majalla followed those requirements.

But sharī'a texts remain immune from change whenever they are custom free. An example, according to the Majalla, would be the law establishing that

"the punishment of a killer who committed his action on purpose was capital punishment [*jazā' al-qātil al-'amd al-qatl*]" (*ibid.*). It is hard to see why such a legal maxim is not based on any custom—otherwise, where did it originate from? In short, sharī'a texts that have survived the hardships of the times are the ones not tied up to custom, while custom was the final cause whenever an excuse for change had to be rationalized.

A third rule sould be added to complete our understanding of law and custom, namely concerning the dependence of custom on language and how it would affect judicial decision making. The Majalla's *sharḥ* distinguishes, in line with many jurists, between three types of "utterances" (*lafẓ*): those whose meaning is "real" (*ma'na ḥaqīqī*); those with a "metaphorical" meaning (*ma'na majāzī*); and, finally, those whose meaning is "metonymical" (*ma'na kinā'ī*) and could be either real or metaphorical (1:43-4). Obviously, whether we decide to follow the fiqh or modern linguistic theories, we have to accept that many words or use of words in any language do not denote anything "real" but constitute what would be described as "metaphorical" propositions (e.g., "the ruling had a chilling effect"). Thus, if I say, "He's like a lion," the real meaning would be to identify that man with being a lion, while as a metaphor it would point to the man's courage and will: he has the courage of a lion. For the fiqh, such distinctions are of vital importance. To begin with, at a general level, there was an awareness that the majority of utterances could not be reduced to a flat, uni-dimensional, and real meaning. But accepting the principle of a necessary metaphorical level also implies an acceptance of the possibility of a multiplicity of meanings for each utterance. In the fiqh literature, such a multiplicity is either acknowledged on the basis of variations of custom from one locality to another, or variations in time (utterances have different meanings from one period to the other), or both. The Majalla worked with the assumption that "in essence" (*fī-l-aṣl*)[72] each utterance has a real meaning; but such meanings, due either to inconvenience, impracticality, or time framework, had either acquired new metaphorical meanings or dropped (*mahjūr:* abandoned) them altogether. This duality between *aṣl* and metaphor was another source of disagreement between Abū Ḥanīfa and his two disciples. The founder thought that we should always "go back" to the original meaning to see right from wrong, while his disciples opted for the *majāz* over the *aṣl*. The Majalla, in turn, favored the opinions of Abū Yūsuf and Shaybānī on this issue, thus opting for a process of "contextualization" of every utterance. In

72. On the meaning of *aṣl* in the context of the Ḥanafī fiqh, see, Ya'akov Meron, "Forme et substance en droit musulman," *Islamic Law and Society* 5, no. 1 (1998): 22-34. Zarqā', *Madkhal,* 2:1061, defines *aṣl* as "what could be constructed upon, while it cannot itself construct on anything else [*mā yabnī 'alayhī ghayri-hi wa-lā yabnī huwa 'ala ghayri-hi*]." For both Meron and Zarqā', *aṣl* is close to the Aristotelian notion of essence.

short, Ḥanafism requests a similar process of contextualization for all kinds of customs, whether of linguistic origin or not—a process that opened the law to more variation and indeterminacy.

Table 1-3
The logic of the late (Ottoman) Ḥanafi practice in terms of legal doctrine and its relation to judicial decision making

legal doctrine and basic normative rules	judicial decision making
Even though the Ḥanafīs accept, as do all other schools, the four basic rules (originally developed by Shāfi'ī) of Qur'ān, sunna, analogy, and consensus, by the fourth/tenth century a consensus has developed within the literature which increasingly looks at the "foundations" (*uṣūl*) in terms of the works of the founding fathers of the school, and more specifically, Shaybānī's six basic books (*ẓāhir al-riwāya*).	Judges and muftīs selectively opt for opinions within the school, even though seldom by analogy, and mostly on an ad hoc basis through consensus.
The self-reliance on the literature of the school has created a "hermeneutic circle" where authors and texts are situated within a juristic typology of genuine interpreters and followers. Thus the bulk of "positive law" (*furū'*) became structured on the basis of rank and status within the school.	When judges and muftīs quote opinions in their rulings, they care mostly about the "predominance" (*tawātur*) of the views of an author or text, and their status within the school.
Even though the Ḥanafīs did not develop a sophisticated theory of the state and political power, they nevertheless came to accommodate their doctrine within the constraints of the dynastic rules to which they had been subjected, and with the Ottomans, Ḥanafism became a state doctrine. Thus originated the notion of the *maṣāliḥ mursala,* norms that have been accepted for their "pragmatic" value, despite the fact that they are not particularly recommended.	The mīrī-iltizām system was not particularly recommended by the late Ḥanafīs, and they left it for the most part outside the scope of their writings.
Customary norms are acknowledged by the Ḥanafīs and have the status of legal norms.	Judges and muftīs sought to contextualize all utterances and practices based on the locality from which they had originated.
Property (*milk*) is understood as a "right" (*ḥaqq*) rather than as a "material" thing. The tripartite division between tangible objects (*a'yān*), usufructs (*manāfi'*), and debts (*duyūn*) constitutes the domain of property as such. However, only tangible objects are *māl,* meaning that they could be freely exchanged with other commodities, while usufructs and debts are not, both of which are *milk lā māl.*	The Ottoman sharī'a courts have considerably expanded the nature of contractual settlements through procedural fictions (see infra Table 2-2), so that in many cases, the validation of a contract went through a fictitious judge's ruling.

legal doctrine and basic normative rules	judicial decision making
Ibn Nujaym's *Ashbāh* has accumulated what the Ḥanafīs have come to accept as their "general rules" (*qawā'id kulliya*), which are general principles that serve to bring the foundations of the school under clearly established norms, thus (unofficially) bypassing the traditional "hermeneutical circle."	The rules below have been selected on the basis of their links to the cases presented in this study.
Properties could either be acquired or else bargained for through an offer and acceptance (*ījāb wa-qabūl*), thus leading to a contract (*'aqd*) between the two parties. However, only a debt entails an "obligation" since the property must be handed in to the buyer to complete the transaction, which annuls any obligation.	
1. A judgment is in accordance with what the object of an act may be (*al-umūr bi-maqāṣidi-hā*) (Majalla, 2).[73]	If the purpose is, say, a donation, while the contract stipulates a payment to the giver, then the contract is invalidated, or else it would be considered a sale contract thus invalidating the donation.
1.1 In contracts, attention is given to the objects and meaning, and not to the words and form (*al-'ibra fi-l-'uqūd li-l-maqāṣid wa-l-ma'ānī lā li-l-alfāẓ wa-l-mabānī*) (Majalla, 3).	If the framing of the contract was, say, a donation, but the transaction involved a payment, then the contract would be invalidated as donation and transformed into a sale contract.
2. With doubt certitude does not fade (*al-yaqin lā yazūlu bi-l-shakk*) (Majalla, 4).	Judges should not waive an established evidence simply because of possible doubts over its veracity.
2.1 The remaining of a thing in the state in which it was found is the presumption (*al-aṣl baqā' mā kān 'ala mā kān*) (Majalla, 5).	When there is uncertainty about an established evidence, judges should opt for the original state of the thing.
2.2 When a thing is proved for one time, judgment will be given in favor of its continuance until there is proof to the contrary (*mā thabuta bi-zamān yuḥkam bi-baqā'ih mā lam yūjad dalīl 'ala khilāfih*) (Majalla, 10).	Those rules became crucial in establishing evidence, in particular when it came to procedural fictions. Thus, "proof to the contrary" meant that the denier would take oath, and if he didn't then the disputed thing would continue as it always was.

73. The elliptic Arabic of the general rules, as originally stated in Ibn Nujaym's *Ashbāh,* makes their translation no easy task. One could thus opt for *al-umūr bi-maqāṣidi-hā* a literal translation, such as "things should be assessed in terms of their purpose," or a more comprehensive translation that would make it easier to understand the rule: "A judgment is in accordance with what the object of an act may be." I've adopted the latter from an early translation of the Majalla, published in Lahore: "All-Pakistan Legal Decisions" (1967, reprint of 1901 edition), which I've used in this study in correlation with my own understanding of the Majalla.

legal doctrine and basic normative rules	judicial decision making
2.3 As to attributes which may exist or not, the presumption, which there is, is that they do not exist (*al-aṣl fi-l-umūr al-ʻāriḍa al-ʻadam*) (Majalla, 9).	The presumption for all "contingent things," meaning all kinds of allegations that might or might not have occurred, is that they do not exit unless proven otherwise. A judge has therefore always to presume the innocence of the defendant, because innocence is the original state of any human being.
2.4 Freedom of indebtedness is to be presumed (*al-aṣl barā'at al-dhimma*) (Majalla, 8).	Since freedom of indebtedness is, like innocence, the original state of being, a judge has to presume it until evidence to the contrary.
2.5 To a man who keeps silence no word is imputed, but where there is a necessity shown, silence is a declaration (*lā yunsabu ila sākit-en qawl, wa-lākin al-sukūt fi maʻriḍ al-ḥāja ila al-bayān bayān*) (Majalla, 67).	In the few sharīʻa cases involving homicides (see *infra* Chapter 11), silence turns out to be a golden rule. In fact, in those cases, plaintiffs typically come to court only with accusations, but without evidence. The plaintiff, however, has the right to push the defendant, as someone who denied the killing, to take oath, and had the latter kept silent, his silence would have been interpreted as declaration. For that very reason, plaintiffs did not push their defendants for oath taking for the sake of a contractual settlement.
3. Custom is of force (*al-ʻāda muḥakkama*) (Majalla, 36).	Fundamental rule, one of the most important in the *Ashbāh,* out of which other sub-rules could be deduced, and which opened the way towards the integration of customary norms into the corpus of the fiqh. Many contractual settlements became accepted through fictional court procedures on the basis that their force originated in custom (see Chapters 1 & 3).
3.1 What is directed by custom is as though directed by law (*al-taʻyīn bi-l-ʻurf ka-l-taʻyīn bi-l-naṣṣ*) (Majalla, 45).	A sub-rule that gives custom the status of law.
3.2 Under the guidance of custom the true meaning is abandoned (*al-ḥaqīqa tutrak bi-dalālat al-ʻāda*) (Majalla, 40).	The "true meaning" of an utterance or statement is their literal meaning, which stands in opposition to the "metaphorical meaning," and which the law attempts to avoid. But custom, however, is an even stronger guide, so that the meaning of an utterance is relative to the locality from which it originated.

legal doctrine and basic normative rules	judicial decision making
3.3 It cannot be denied that with a change of times, the requirements of the law change (*lā yunkar taghayyur al-aḥkām bi-taghayyur al-azmān*) (Majalla, 39).	Fundamental rule (or sub-rule), for which Ibn ʿĀbidīn had devoted an entire "epistle," that would have been incomprehensible without the notion of the changing customary practices. However, even though the Ḥanafīs did admit change, even one that could even influence the foundations of the school, such a change did not get "historicized" within their doctrine, so that we have opinions that are modified or become obsolete, but for which no historical path has been provided.

4/4

The marginalization of law

The two quotes at the beginning of the present Chapter exemplify best what our long *détour* has led us to. Both Ibn ʿĀbidīn and Max Weber acknowledge in a way that is similar the influence of custom in such a way that the implementation of a new law by the legal authorities, and through a reinforcement of the state agencies, does not entail that the people in a particular community will forego custom and follow that law. Since my aim in this study is to highlight the mutual interactions between law and the economy—how those two "orders" influenced one another, and to what degree, at which level, they manifested a certain compatibility, and what kind of incongruence, if any, did exist—I would like to situate my project within a Weberian perspective which does not perceive the relationship between law and economics as causal in its nature, and then assimilate Ḥanafī practice and the Ottoman qānūn within such a perspective.

To begin with, and as a general rule, which reiterates the Weberian perspective outlined above, the correlation between a "legal order" and the "corresponding" "economic relations" remains always uncertain at best. Thus, "Under certain conditions a 'legal order' can remain unchanged while economic relations are undergoing a radical transformation."[74] As we will see in Chapter 4, even late Ḥanafīs kept reasoning in terms of the much older "taxation" forms of the *ʿushr* and *kharāj* rather than provide a new legal language for the iltizām-mīrī system. Such a discrepancy could be partly explained by the fact that sharīʿa law neither interfered much with sultanic legislation, nor did it provide any framework for managing the economies of mīrī domains. It thus

74. Max Weber, *Economy and Society,* 1:333-4.

remained an overall private system of adjudication, very much in conformity with the local customs in all their varieties, to the point that the two were for the most part indistinguishable. In fact, it is possible to think of the sharī‘a system as a parallel system of adjudication to custom, but one whose authority went far beyond a certain locality, and whose knowledge and rulings were transmitted in writing, thus granting it more prestige and authority. But, other than that, the system did neither push for a greater homogenization of contract, which is the heart of any legal system (see Chapter 3), nor did it push collectively owned properties such as the waqfs into a form of sophisticated corporate arrangement (which would have also required the parallel notion of juristic personality). In short, and as rule, state intervention is neither needed to create and protect a legal order, nor to enforce the law, as the role of custom could be crucial in both. Thus, the Ottoman qānūn was a broader regional and inter-regional system creating legislation over matters, such as conscription, custom taxes, and obligations, and monetary transactions bearing an interest, for which sharī‘a law either had not much to say or was outdated.

What the Ḥanafī discourse on custom points to was how much customary practices had a force of their own, so that the enforcement of contracts, whether emanating from a court or informally, was indeed inconceivable without that power of custom. In fact, in traditional societies contract was very much tied to status—what Weber labeled as “status contracts”—to the point that their enforcement went through the usual customary networks rather than any of the state agencies. The contractual settlements that we will come across in many of our cases, both civil and penal (even though such a distinction proves useless in many cases in particular when an “obligation” was framed in terms of a harm inflicted to the other party) were not implemented through a substantial legal protection monitored by the state, especially as such activities were practiced within a small élite group. Thus, overall the courts remained relatively conservative when it came to working out a system of contracts and obligations that was more formal since that would have implied the spreading of contractual settlements towards a much broader base.

But, obviously, customs do not solely exist for the sake of a legal order, as their practices are associated with a variety of cultural, religious, and political implications, and their impact on an economic system tends to be unclear at best. Conversely, when the state aggressively promotes a series of economic and legal reforms, as was the case throughout the Tanẓīmāt, their impact on society could be very limited precisely because of custom and the binding role it plays, not to mention the parallel role of the sharī‘a courts. Moreover, the impact of a set of legal reforms on the economy could be very limited because the connection between law and economy is not necessarily a causal one, while drastic economic reforms, as have become fashionable in the Third

World today (but also under advanced capitalism), are often implemented without their legal prerequisites, so that individuals find themselves in newly imposed contractual relations but with no adequate legal protection. Economic relations could thus undergo a radical transformation, due, for example, to an excessive inter-regional trade activity, while the legal order remains ensconsed within its old networks.

Custom becoming law

H.L.A. Hart made a famous distinction in which he conceptualized "law as the union of primary and secondary rules."[75] For our purposes here, custom could be viewed as those "primary rules" upon which the "secondary rules" of the fiqh act as a set of abstract norms with a long tradition and a juristic typology construed by jurists and scholars. Thus, rather than view a level as predominating and imposing itself upon the other, or to look upon the future in terms of a gradual process of codification through which custom will receive its share of marginalization, the alternative would be to perceive both levels as strongly interdependent on one another, concomitantly shaping each other's practices. Custom would then be looked upon as a never ending flux of norms, ever alive and vibrant, but for the most part remaining vague and unformulated; hence as a process without which social life would come to a standstill. Following Fernand Braudel's *longue durée,* custom would be perceived as what perseveres the most in a society, far below the flood of events and incidental happenings.[76]

1. In a preliminary definition of custom, the Ḥanafīs broadly accept it as a behavior that people of a locality or region have very much adapted to in their daily lives to the point that it has achieved the status of norm.
2. The process as to how a norm becomes law has not been openly established, but the underlying assumption is that it must at some point be "acknowledged" by the fiqh.
3. That process of acknowledgment remains the most obscure part as it is unclear how the move from a commonly accepted normative behavior to a legal norm effectively takes place.
4. Even though the Ḥanafīs do acknowledge a "bodily custom [*'urf 'amalī*]," their emphasis is indeed on "linguistic custom," which perceives customary practices mostly relative to their linguistic components.

75. H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994 [1961]), Chapter 5.

76. François Ost, *Le temps du droit* (Paris: Odile Jacob, 1999), 86-89: "Règle coutumière et processus coutumier."

5. One can therefore assume that the transformation from custom to law, whenever that occurs, is a process of *linguistic* assimilation, that is to say, all what matters from a legal point of view is how the practice translates into speech, which, in turn, is what the law should restrict itself to once it accepts the customary norm.
6. What was effectively received by the fiqh as customary practices were for the most part all kinds of contractual settlements, such as the *khulū, gedik, marṣad, musāqāt* and *muzāra'a,* and *bay' al-wafā',* all of which were received on a de facto basis with a poor integration into the corpus of the law of contract.
7. The assimilation of such practices into law probably first came in the form of local fatwās, prior to being acknowledged in some of the major doctrinal works, and, in between, the sharī'a courts might have made some contribution through the required procedural fictions that legalized and routinized those contractual settlements.
8. The predominance of procedural fictions (see Table 2-2 *infra*)—at least in nineteenth-century sharī'a courts—is a sign of the poor assimilation of customary practices becoming law: rather than openly and explicitly stating its objectives, a contractual settlement had to arise *ex delicto,* that is, one of the parties had to act as defendant for having committed a delict against the plaintiff, prior to achieving a contractual settlement in court. Procedural fictions thus became important tools of evidence in that they provided for a formalized bargaining process prior to the ruling.
9. Customs were therefore accepted as law for their economic necessity, so that not acknowledging them would have hurt the interests of the common people.
10. In spite of the fact that custom in general was fully endorsed, Ḥanafī scholars were for the most part unhappy with the customary practices that their madhhab had to reluctantly assimilate, even though the substance of the law remained intact, so that their assimilation remained conceptually marginal.
11. The fiqh had therefore assimilated lots of practices that did not match well with its core concepts (in particular regarding property, rent, and contracts). That in itself did not pose much of a problem for jurists who looked at such practices within the *maṣāliḥ mursalah* doctrine, that is, practices that were neither prohibited nor recommended, and thus kept the fiqh distanced from the contractual forms that originated in Ottoman times. Thus, Ibn 'Ābidīn's radical claim that "all the contracts of our time are invalid," falls well within the global attitude of Ottoman jurists that such contracts are invalid from a legal point of view, and their acknowledgment as customary practices is, *faute-de-mieux,* only *temporary.*

12. In effect, Ḥanafī doctrine on property, rent, and contracts did not substantially change, and the *mīrī-iltizām* system had not been conceptually assimilated.
13. It remains uncertain what the fiqh labeled as "customary" originated from. In fact, it is naïve to even assume that such practices only originated in the localities they were attributed to. For one thing, borrowing from other legal systems is frequent, and, for another, many practices were, the outcome of the change in the Ottoman land-tenure system, towards which the fuqahā', for the most part, remained passive and uncompromising.
14. The core of Ḥanafism remained therefore substantially the same, with all kinds of peripheral—but economically essential—practices reluctantly integrated under the label of "custom." Thus, only the fiqh's recognition of customary normative behavior (whether it effectively was or not) was what granted it the status of law to customs. The procedural fictions provided by the sharī'a courts played an essential role in the process of official recognition as it enabled individuals to legalize their (customary) contractual settlements.

Chapter 2

Repetition and the reaffirmation of the ideal: The enterprise of judging and the "idealization of the absent"

The enterprise of judging between cases and texts

In the well-known tradition of "the ethics of the judge (*adab al-qāḍī*)," the stakes were higher than the routinized ethical matters or the management of the judge's business. In fact, scholars and judges alike perceived their own *praxis* as a total experience, one that was primarily based on a discursive activity rooted in language and of centuries of hermeneutical labor, and which, in turn, formed the essence of custom-as-law, on the one hand, and the practices of the courts, on the other.

Ibn ʿĀbidīn's own contribution to the subject, besides the *Radd'*s preamble and introduction and a couple of the *rasā'il,* comes in book five of the *Radd,* the "Book of Judging (*Kitāb al-qaḍā'*)," right after the lengthy "Book of Selling (*Kitāb al-buyūʿ*)," and followed immediately by other books related to the topic of judging: witnessing, lawsuit, and litigation. The order in which all these books follow one another does not say much about Ibn ʿĀbidīn's own thinking on these matters since he reiterates accustomed formats of most Ḥanafī treatises.[1] The fact therefore that "judging" comes right after the topic of "buying and selling" does not suggest what the enterprise of judging is about. Furthermore, the books related to "the contract of hire (*ijāra*)," "sharecropping (*muzāraʿa*)," "pre-emption (*shufʿa*)," and the like (such as the concept of *musāqāt,* another sharecropping contract but related to plantations, is surprisingly located in a different chapter than *muzāraʿa*), should all have logically succeeded the book of buying and selling (*buyūʿ*) since they represent variations on the contract of sale, which in essence was

1. On the structure of the *Radd* and *Rasā'il,* see Appendices 1 & 2 *infra.*

considered as exchanging "commodities of equal values." Moreover, since all notions of "rent (*ijāra*)" have been construed by analogy to sale—a step that has endlessly complicated rent as such by introducing confusing notions of *tamlīk* ("ownership") in rent—all the "rent" chapters should have logically been located after those of sale. Yet, in the *Radd,* these topics come much later, after the distraction imposed by the lengthy digressions on judging and other related topics. The book of judging itself is not characterized by logical organization either: Constructed like the other books and sections along the principle of "request (*maṭlab*)," it looks more like a collection of fatāwā on issues that could have certainly been ordered more comprehensively. When reading any of the books of the *Radd,* it is therefore essential to break with the order of the sections and sub-sections, while following as much as possible the logic of the flow of the text itself: in other words, once we create *our* own order, it is essential to go to the original text-order and see why it has not been followed. The same method applies to the sharī'a court documents and other legal texts as well.

The judge was a person representing in his own locality the authority of the sultan and the sultan's desire to rule fairly among his *ra'iyya.* The sultan was already a guardian who took care of the public properties—known as *arāḍī al-mamlaka wa-l-ḥauz*—of his subjects, perceived by analogy as "minors." In addition to his guardianship role, the sultan had the capability and the responsibility of making just rulings. He therefore was the first judge, and appointing judges all over his *mamlaka* was no more than an act of delegation, simply because he could not be physically present everywhere. Unlike the judge, however, the sultan was not appointed by someone else, either a person or an institution: it was rather an act of *mubāya'a* from the *ashrāf* and *a'yān.* Yet, even with this *bay'a,* which provided the sultan with a mantle of legitimacy, the process would still be incomplete without him "executing his rule over his *ra'iyya* out of fear from being himself defeated [*khawf-an min qahri-hi*]" (5:364).[2] So, the primary "contractual" basis of the relationship between the sultan and his subjects was based on "fear (*khawf*)." But unlike Hobbes' "fear of death," which was based on the individuals' fear from each other's aggressiveness in the "state of nature," the sultan was someone who nurtured fear vis-à-vis his own *ra'iyya.* He therefore had to conquer those suspicions by imposing his "rule (*ḥukm*)" over those who created fear in his own soul, so that the state of fear ended up imposed upon the souls of the sultan's subjects. What was decisive in those representations of political power was that the act of governing did not rest on anything "contractual": in other words, there was

2. All in-text references in this chapter are from the *Radd:* the volume number precedes the page number(s).

no "covenant" à la Hobbes or a *contrat social* à la Rousseau that would have insured any form of "consensus," either between the subjects themselves or between the subjects and their sultan (and hence with the state in general). A generous approach would perceive the mutual fear-relationship as bearing few similarities with Mu'āwiya's *ḥilm:* it was indeed a "balance of power" between "adversaries" who were manifestly polite with one another in order to contain one's "state of anger," only to wait for the right moment for the fatal blow.[3] By establishing tyranny as the rule for "government," there was little room for a system of justice established on any form of "communicative action," as Habermas would say, whether distorted or undistorted ("ideal speech"); instead, communication gave way to "defeat (*qahr*)," "dominance (*ghalaba*)," and "isolation and seclusion (*in'izāl*)."

> Once the sultan is chosen [*būyi'a*],[4] and proves unable to impose his own rule [over his *ra'iyya*] because of some inability in controlling them, he cannot then become a sultan. For if he becomes a sultan through the process of *mubāya'a*, and he proceeds in defeating and dominating, he wouldn't isolate himself, because if he does become isolated [or deposed], he becomes a sultan only though defeat and dominance, and this is not useful; and if he doesn't possess the ability to defeat and dominate, he would then become isolated. [...] He should also be tough [*shadīd*] without being violent, and soft without being weak, because judging [*al-qaḍā'*] is one of the most important matters for the Muslims, so that everyone who is more knowledgeable, more competent, distinguished [*awjah*], with higher standing [*ahyab*], and more patient with people should have priority [in judging and being a judge]. The sultan should look at that carefully and appoint someone who has that prerogative [*yūlī man huwa awlā*] because [a ḥadīth said:] "The one who appoints someone to a job and there is someone else with better qualifications, is a traitor to God and His Messenger and the Muslims in general" (5:364).

The venerable position of the judge was therefore, prior to being a judicial appointment, a political one. For one thing, it was a representation of the

3. On the notion of *ḥilm,* see Henri Lammens, "Le « ḥilm » de Mo'âwia et des Omaiyades," in *Études sur le règne du calife omaiyade Mo'âwia 1er* (Beirut: Université Saint-Joseph, 1908), 66-108; Zouhair Ghazzal, "From Anger on Behalf of God to 'Forbearance' in Medieval Islamic Literature," in *Wrath and Righteousness: The Social Uses of Anger in the Middle Ages,* Barbara Rosenwein, ed. (Ithaca: Cornell University Press, 1998), 203-30. It seems that at least some of the *ḥilm* qualities survived with the Ottoman sultans, see Leslie Peirce, *The Imperial Harem* (Oxford: Oxford University Press, 1993), 177: "As Tursun Beg argued in the introduction to his late-fifteenth-century history, the sultan's principal means of ensuring order was the judicious application of summary punishment (*siyaset*); this right of the sultan over the lives of his subjects was itself a source of tyranny, however, if it was not exercised within the confines of the holy law, and not tempered with forbearance (*hilm*)."

4. The *bay'a* was in principle a process of selection and endorsement of the new sultan primarily by his own dynasty (or "House"), and also by the *'ulamā'* and notables, and the military.

sultan's mandate, at the same time, the latter's toughness and softness. Such qualities, however, would have become meaningless without the prerequisites of *qahr* and *ghalaba.* Both notions—defeat and domination—assume in turn the classical Khaldūnian concept of "subservience (*istitbā'*)": the dominating "group feeling (*'aṣabiyya*)" holds on to power by "subserving" the other weaker group feelings; and in this process of political domination, the social and cultural structures of the dominated groups remain "autonomous" on their own. Needless to say, such political domination, even though it mixes tyranny with complex images of legitimation, neither relies upon a theory of kingship nor of "civil society," nor on a representation of "the republic as a polis," nor on a "society of individuals" (Norbert Elias).[5]

The judge could therefore have been the sultan's "soft" side, that is, the part of him that did not rely upon pure physical violence, but on symbolic violence.[6] When justice was no longer associated with delegation of power, the

5. Aziz Al-Azmeh, *Muslim Kingship* (London: I.B. Tauris, 1997, 2001), maintains that the bulk of Islamic literature neither developed a theory of state, nor of kingship and "society" for that matter. Moreover, religion was more of a "tool" that added charisma and prestige to a ruling dynasty than a representational ethos that might have come in conjunction with politics: "It will be clear from the foregoing that Arabic, and more generally Muslim, writing on politics in the Middle Ages does not contain or constitute a theory of state. Nor does it regard kingship as more than the sum total of royal activities, which are described and tabulated but not theorised. It is true that there are, in general, indications about the types of government, be they based on religion, on reason, or on caprice. But this is a typology of royal motivation, not a theory of the state. There were also available many redactions of the idea, not exclusive to Ibn Khaldūn, that states commence with vigour, later tempered by confidence, and terminate in effeminacy and injustice, and that each of these stages has correlative royal characters and propensities. This view is variously attributed to Platonic and other origins, was very frequently expressed in moralising and censorious terms, and was very long lived, finding expression in various Ottoman writings on politics where it took on an elaborately theoretical turn in the form of a vitalist and organismic metaphor" (113).

6. However, the "contract" in this case is different from the Hobbesian type of "covenant": indeed, in Hobbes' *Leviathan,* the power *delegated* by the "people" to their sovereign is to perpetrate a state of peace in "civil society." What in fact is delegated by the people to their sovereign is a legitimate use of violence and its monopoly by the state (in both its legislative and executive branches). The sovereign is thus primarily needed to create and maintain a *civil* peace, and his monopoly of legitimate violence has no other purpose but to assure that society perseveres in its being. The various conceptualizations of political power in the Islamic literature, however, and which Ibn 'Ābidīn's text reflects clearly, all take for granted that a ruling dynasty must hold on to political power by force in order to survive; but the *telos* of political power—or of *'aṣabiyya* in the language of Ibn Khaldūn—seems nothing but the state itself. In other words, the purpose of "politics" is to maintain the dominant dynasty in power: therefore, peace among the *ra'āya* is only an *outcome* of a dynasty establishing itself and maintaining political power over several generations to come—there is no delegation of power, or limits imposed upon the executive, or a legitimate use of violence, or even a civil covenant since "society" does not request anything from its sovereign in the first place. Furthermore, in Islamdom, not only political power is associated with religious representations, but, more important, it creates an image of war as *outside* the *umma:* in other words, the *dār al-ḥarb* is "outside" the *dār al-Islām,* and "peace" is created by absorbing as much as possible of the territory of the infidels. Again, placing "war" "outside" the "society of believers," the *umma,* is a reversal of the Hobbesian

sultan needed an apparatus of justice at his disposal for the same reason he had to conquer and neutralize his enemies—to maintain political power so that his own dynasty perseveres in its being. The sultan therefore delegated power to the judges and other officials for that sole purpose. The judge was the sultan's representative, manifesting the latter's desire to rule justly. As Ibn ʿĀbidīn points out, and following a Prophetic tradition, the appointment of judges should only follow one rule: that the most knowledgeable, prominent, and capable person should be appointed. Being his appointee and representative, the judge must have therefore inherited some of his master's charisma. However, the judiciary did by no means receive its sole legitimation from the sultan. It did obviously identify with its own school of thought, which was locked into a hermeneutical process of totemic identification.[7] That circle was broken at times by the power of ruling dynasties, who either mixed the law with their own customs (such as the Mongols), or else created new property and contractual rights to which the law had to bend to; not to mention the power of all local customs which were given as such a factual immediacy, and to whose referents (*dalālāt*) the law could do nothing but accommodate. The sultan too had the power to break this hermeneutical circle since he was the sole source of new legislation in the form of *qānūn* (qānūnnāme, *dustūr*s, firmans, orders, and edicts).[8] The system therefore "renewed" itself from two "external" alien sources: custom and sultanic legislation in all their forms, both of which either pushed the fiqh, albeit very cautiously, to orient itself towards the needs of the times, or else created a parallel judicial decision-making process in the form of regional councils and other official institutions.

But we need not push further the Ḥanafī representations of judicial and political power and their interconnections as they tended to remain pretty limited. In fact, even in the heydays of the ʿAbbāsid Empire, in particular

paradigm in which the "state of nature" is by definition a "state of war": war, violence, insecurity, fear, and the like, are all *inside* phenomena that "society" has to contain all by itself—by delegating the legitimate use of violence to a sovereign. Thus, by defining the state as the apparatus that monopolizes the legitimate use of violence, Weber did nothing more but to provide a socio-historical definition of the Hobbesian paradigm.

When there is no delegation of political power, and when "peace" is a manifestation of the sultan's power and a sign of his success (or failure) rather than a desire of the *raʿāya,* what is the judicial system supposed to do under such conditions? In the Hobbesian model of a "civil society" versus an omnipotent sovereign, justice is also a matter of power *delegation.* In the state of nature, every individual is his *own* judge; while in civil society—the commonwealth—this ability to judge, adjudicate, and execute has been delegated to the sovereign who now assumes all three functions together: he is the source of all legislation, adjudication, and execution. Indeed, it is only with John Locke that all these functions became separated from one another.

7. See *supra* Chapter 1.

8. On sultanic legislation, see Chapter 10 below.

the first two centuries when all four legal schools were still in their formative periods, it was the Ḥanbalī groups that were the most unruly, even though they never reached the point of establishing anti-state movements, and their representations of political power tended to be elusive at best. In fact, the Ḥanbalī strategy developed around the dubious notion of "commanding right and forbidding wrong (*al-amr bi-l-ma'rūf wa-l-nahī 'an al-munkar*)," and thus tended, depending on the period in question and the charismatic aura of the leaders of their school, either to present itself as a private ethical system with no visible political implications, or else political power was suspiciously looked upon because it did not fulfill its duties in forbidding wrong. But as the power and aura of the Ḥanbalites began to lapse with Būyid domination (334-447/945-1055) and then the Seljūq period (447-590/1055-1194), they were even less influential under the Mongols and Mamlūks, despite notable renewals of the foundational elements of the schools under the Damascene Ibn Taymiyya (661-728/1263-1328). But even though Ibn Taymiyya spoke of "the role of constituted authority in forbidding wrong,"[9] a theory of the state was never present, or else representations of political (sultanic) power were always wrapped in a moralistic tone.

It is no surprise therefore that under the Ottomans the Ḥanbalī movement regressed even further,[10] in particular that the state opted for the Ḥanafī school, despite some leading figures in the judicial field such as Shaykh Birqāwī and several of the Shaṭṭīs (who were also *'ālim*s and biographers).[11] What the Ḥanbalī episode points to, however, is a conspicuous inability, if not an unwillingness, to frame a discursive problematic that would conceptualize the relationship between the political power of the state (or that of the caliph, or sultan), on the one hand, and the various groups in society on the other. Instead, the moralistic attitude of right and evil, in particular when associated with a militant doctrine, only contributes in obscuring the relationship between state and society.[12]

9. Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge: Cambridge University Press, 2000), 155.

10. Cook, *Commanding Right,* 191-92: "In Arabia, as in the Fertile Crescent, the expanding bureaucracy of the modern state meant the end of Ḥanbalite history as we have known it in this study. But where the reformed Ottoman state and its successors effectively destroyed the traditional role of the Ḥanbalite scholars, either absorbing them as individuals or pushing them aside, the rise of the modern state in Sa'ūdī Arabia preserved that role by a kind of ossification, turning the scholars into an appanage, though not always a docile one, of the state bureaucracy." Eventually, Wahhābī reformism, in particular its success in appending reformist intellectuals into the state institutions, will attract late Ottoman Damascene scholars, such as the salafī group centered around Jamāl al-Dīn al-Qāsimī.

11. See below the following section on "the culture of the judges," and Table 2-1.

12. This lack of articulation between law, state, and society, should be taken into account more broadly in the general context of Islamic history. Between c. 950 and 1250 feudal Europe went through its first "modern

That a sophisticated theory of the state and its relationship to the judiciary is conspicuously absent in Ḥanafī doctrine should therefore come as no big surprise after this brief historical survey. In fact, compared to the Ḥanbalīs, the Ḥanafīs were an even more docile group, whose docility increased further under the Ottomans. But it would be misleading, however, to perceive Ḥanafī practice as "state law," especially as discursive practices in place at various levels only point to a relative autonomy vis-à-vis the state and its institutions.

If Marshall Hodgson's characterization of the Ottoman Empire as one of "qānūn-consciousness,"[13] which had replaced a much weakened, if not obsolete, "sharī'a-consciousness" under early 'Abbāsid rule, is correct, then it is surprising that Ibn 'Ābidīn's *Radd* and *Rasā'il* demonstrate no cognizance of that transformation: nowhere does the qānūn pose itself as a legal phenomenon worthy of reflection, whose role side-by-side to the fiqh is worth exploring. Such an "omission" is, however, less surprising once we realize that it is complemented by several other crucial omissions. For example, both the *mīrī-iltizām* and its predecessor, the *timār-sipāhī,* land-tenure systems were not the subject of any scrupulous conceptualization worthy of an empire whose main source of revenue was agriculture. More surprisingly still, the old obsolete taxation systems of *'ushr* and *kharāj* were given prominence throughout the *Radd* as if nothing had happened in the meantime.[14] All such "omissions"

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revolution" which restructured feudalism radically and gave way to the *seigneurie* regime. More importantly, that regime, besides restructuring land appointments and tenures, brought all kinds of new "connections" between the state and local communities which the Islamic societies on the eastern Mediterranean and Asia had not witnessed: "A general characteristic of kingship in western and southern Europe in the twelfth century was the growth and intensification of the connections...by which kings transmitted their wills to the local communities...guidelines and measures passed on from above to competent agents at local level... careers and interest groups formed at the beginnings and ends of these routes of administrative traffic...were the means by which regional societies could acquire statehood. Without such connections and without their local officials and advocates kingship was forced to remain distant and sporadic...irrelevant for the mass of agricultural production" (Karl Leyser, quoted in R.I. Moore, *The First European Revolution, c. 970-1215*, Oxford: Blackwell, 2000, 194). As Quentin Skinner has argued, the Italian renaissance went even further and conceptualized a modern notion of the state and civil society, one that bypassed claims of kingship from both the Holy Roman Empire and the Catholic Church: "There is clearly a revolutionary political claim implicit in this defence of the Italian cities and their *Imperium:* the claim that they ought to be recognized as fully independent sovereign bodies...[thus leading to that] revolutionary step of introducing the same doctrine into civil law, thus making the first decisive move towards articulating the modern legal concept of the State" (Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols, Cambridge: Cambridge University Press, 1978, 1:11). Needless to say, the Indo-Islamic world, which was dominated almost exclusively since the weakening of the 'Abbāsid caliphate in Baghdād by ruthless warrior elites, neither witnessed such a transformation, nor did it articulate a comprehensive theory of the state and society, and the place that law would take into such a system.

13. Hodgson, *Venture of Islam,* vol. 3 (Chicago, 1974), Chapter 3.

14. On the weaknesses of Ibn 'Ābidīn's conceptualization of the Ottoman land-tenure system, see Chapter 4 below.

in terms of a preference provided to much older systems poses a serious problem to modern scholarship, which touches upon the corpus of the fiqh as an historical phenomenon. In other words, and assuming that our historical interpretation follows what a particular author "had in mind" while drafting his text, and that we succeed in detecting a coherence in his thought, how much of that thought is "valuable" in terms of its identification with historical phenomena of the period in question? If a fiqh text only identifies with the notions of its own madhhab while ignoring many other crucial ones, what is then its *historical* significance for its *own* period?

Nowhere did the relationship between judge and sovereign manifest itself more overtly than in the way the sultan ordered his judges what to do and what they should avoid doing. Thus, for example, there was a term-limit, whose *raison d'être* was never fully explained in the fiqh manuals, as to the legal duration of a lawsuit: once fifteen years have passed from the moment a lawsuit began to be debated in court, the judge should not listen anymore to anything related to the case, except for inheritance and waqf cases. The only explanation provided for such a limitation was that of an act of "forbidding (*nahī*)" coming directly from the sultan who routinely imposed such behavior on the judges of the empire. In fact, it does seem that this was a limitation that was created at some undefined point by the Ottoman sultans. Quoting a previous legal authority on the fifteen-year limitation, and which Ibn ʿĀbidīn refers to as "my teacher, *shaykh-ul-Islām* Yaḥya Efendi, known as al-Minqārī," "he has told me that the sultans now order [*ya'mur-ūn*] their judges in all their provinces not to listen to a lawsuit once fifteen years have passed, except in cases of waqf and inheritance. It was also reported in the *[Fatāwā] al-Ḥāmidiyya* that there were fatāwā from the four schools requesting not listening [to fifteen-year old cases] after the aforementioned [sultan's] forbidding [*al-nahī*]" (5:419). This act of forbidding came *personally* from the sultan himself as an "order (*amr*)" and it had to be *renewed* from each sultan to his successor in a ritualized way that would look similar to a personal commitment: from the sovereign to his judges.[15] But what was the sultan committing himself to exactly? Basically, he gave his judges the guarantee that he would protect them for no longer listening to fifteen-year-old cases; and because that was a *commitment* rather than a law—even though given full approval in many responsa—it had to be guaranteed by each sultan individually.

15. That process of "renewal" should have in principle been applied by and large to the entire corpus of the qānūn, see Uriel Heyd, *Studies in Old Ottoman Criminal Law* (Oxford: Clarendon Press, 1973), 172, and 176 on a qānūn whose main purpose was the protection of the common people from the abuses of state and local authorities. Heyd describes the qānūn as "statutes."

> Should the forbidding be kept even after the death of the sultan who ordered it so that after him a new one is not necessary anymore? A fatwā in [Ramlī's] *Khayriyya* states that the banning should be renewed [*tajdīd al-nahī*] because it does not persevere on its own [after the sultan's death]. So if the litigants [in a lawsuit] disagree on whether the forbidding still applies or not, a decision should be made by the judge as to whether what has been ruled upon [*al-maḥkūm 'alay-hi*] is affected by it. [...] It is known from the habits of the sultans of the House of 'Uthmān [Osman] that once a sultan comes to power and a law has been disclosed to him [*'uriḍa 'alay-hi qānūn*] [enacted] by his predecessor, he would normally issue an order to follow it. But this is not enough for our purposes here [that is, the fifteen-year limit on lawsuits] because its meaning [*ma'na*] is that he is simply committed to the laws of his predecessors [*yaltazim qānūn aslāfi-hi*]: he thus orders what they ordered and forbids what they have forbidden. This does not imply that once [the sultan] appoints a judge whom he did not [specifically] forbid to listen to a case, that the judge should be prohibited to do so [on the basis that the laws enacted by the previous sultan have been accepted by his successor]. What [the sultan] should therefore do once he appoints [a judge] is to openly forbid him [*yanhā-hu ṣarīḥ-an*] [to limit himself to the fifteen-year period] so that he can work with that part of the law he committed himself to [*li-yakūna 'āmil-an bimā iltazama-hu mina al-qānūn*]. It is well known that when [the sultan] appoints [a judge], he orders him in his letter of appointment [*manshūr*] to follow, based on habit [*'āda*], the soundest legal opinions of his school [*aṣaḥḥ aqwāl al-madhhab*] (5:420).

The strangeness of such a passage comes from its insistence in having each sultan reproduce the prohibition, to re-open a case after a fifteen-year period in each act of appointment, passed to a newly appointed judge. What purpose did that serve, and why should the banning be passed to each judge individually rather than globally, once the sultan has been enthroned? Apparently, the fact that the banning should be renewed had first been proposed in Ramlī's fatāwā, and the logic here might well be that the qānūn received its legitimation from and was thus tied to the personal authority of the sultan. So, in transitional periods, when authority passes from one member of the dynasty to another, that commitment to the law must be *explicitly* renewed—as if the sultan was manifesting a personal commitment to the qānūn of his predecessors. But why then should the same commitment—not to mention the infamous banning—be passed to each appointed judge individually? Could it be a reaffirmation of the sacredness of sharī'a law versus the temporality of the qānūn? Suffice it to say that the fifteen-year obligation was not a Ḥanafī prescription, but one that was enacted by the qānūn, and hence the latter only renews itself through the personal commitment of each sultan coming to power.

What is therefore of interest to us is the parallelism between how the qānūn *renews* itself in conjunction with Ḥanafī practice. Thus, while the latter kept itself alive through a line of jurists whose opinions imposed restrictions on

one another, and which should have all in principle been based on the *uṣūl* of the founders,[16] the Ottoman qānūn by contrast had no legitimating force on its own except an outside sultanic will: for each *transitional* period, between two sultans, the commitment to the law had to be renewed. While the sacred character of Ḥanafism was enough in itself to provide it with the legitimacy it needed, the qānūn was never related to anything other but the sultan's will and the prestige of his dynasty. Because of the "temporal" (or "secular") aspect of the qānūn, old and obsolete laws could be dropped, forgotten, or simply replaced by new ones. The sultan had to decide on all those matters not only in the form of edicts and other personal orders emanating from him directly, but also in his appointment of judges: the choice itself was important since it was already a sign of the policies the sultan had the intention of implementing; while the letter of appointment, which made the judge the sultan's representative in legal matters, confirmed in turn such an intention. The letter also secured the sultan's commitment to the laws of his predecessor, and requested the judge to follow all the sound opinions of the Ḥanafī school.

The whole issue of the qānūn, however, was brought up only *en passant* in Ibn ʿĀbidīn's text in order to underscore the fifteen-year obligation that judges had to honor when dealing with cases whose disputants had opted for a re-trial; and therefore in itself does not represent much of a contribution towards an understanding how Ḥanafī practice functions in relation to the qānūn. The major reason for honoring the fifteen-year period in which a case could be left on probation was "to eliminate fraudulent tricks and forgery [*wa sabab al-nahī qaṭʿ al-ḥiyal wa-l-tazwīr*]" (5:420). As a matter of fact, the "Book of Judging" was quite severe in its accusations towards the judiciary: corrupt judges who were easily bribed, fraudulent and theatrical suits whose disputants had no genuine case and planned the outcome beforehand, badly kept court registers, and disputants who forged false documents, to name only some of the items in the long list of complaints. So, it is quite possible that the fifteen-year obligation was set in order to deter plaintiffs who, having been disappointed with their first hearing, would reappear much later in another court and come to the judge with false documents, then seek for a retrial. But because such a limitation would have been detrimental to plaintiffs with a genuine case, it divided the jurists as to the scope and meaning of its application: no wonder then a request was made for each sultan to commit himself, all over again, to forbidding a judge from "listening" to a case from scratch.

The various opinions on that matter fall in eight broad categories. (1) Some jurists argued that "the right of a person should not be dropped with time" (5:420), and in order to ensure the fairness of a case whose plaintiff

16. On the significance of the Ḥanafī juristic typology, see Chapter 1 *supra*.

might still have a genuine plea years after the first hearing, procedures must be reestablished even after the sultanic fifteen-year "rule": "The sultan who has forbidden his judges to listen to a case after this period should listen to it by himself, or order that the hearing be reopened, so that the right of the plaintiff is not lost; and this is so whenever there are no apparent signs that the plaintiff was fraudulent" (5:420). (2) Other opinions placed the right to decide on whether the hearings should resume or not upon the "consciousness (*ḍamīr*)" of the judge who was summoned to drop the case in the first place. (3) Another third category of opinions proposed that the judge should refrain from reconsidering a case as long as the defendant is still denying his opponent's claim; however, if he openly acknowledges culpability, his case should be heard since "there is no forgery with admission [*lā tazwīr ma' al-iqrār*]" (*ibid.*). (4) When a plaintiff decides to renew complaints against the other party *within* the fifteen-year time limit, the judge should give allow that opportunity and the hearings should take place in the courtroom (*majlis al-qāḍī*); the plea should be rejected only when the timing of the second complaint (or any other one for that matter) has exceeded the lawful period. Ibn 'Ābidīn then refers to a responsum, or "a fatwā event (*ḥādithat al-fatwā*)" (5:421), in which a man, Zayd, had dropped his lawsuit against 'Umar for fifteen years and never filed suit again even though he approached the judge on several occasions *outside* his own *majlis* and summoning him to reconsider his case: Zayd thus lost every right to pursue his case again because he never filed any request in the courthouse itself within the accepted deadline. There were, however, exceptions to the rule mostly related to cases that *had to* be brought up to court after fifteen years. Had Zayd, for example, bought a house from 'Umar, and, twenty years later 'Umar denied the act of purchase, the whole contract would have to be reconsidered in court, had Zayd demanded so, in order to push both parties to furnish evidence. What makes a re-consideration of the sale contract valid is the lack of opposition from both parties: in other words, "the one who was in possession of the property did so without any opposition [*kāna wāḍi' al-yad bilā mu'āriḍ*]" (5:421). Women used to conclude marriage contracts that included a *mu'akhkhar,* and quite often, after a divorce or the husband's death, these sums had to be renegotiated with the beneficiaries of the succession, so that lawsuits could have been initiated several decades after the initial marriage (considered, from a legal point of view, as the first year of the fifteen-year grace period).

The remaining clauses and exceptions set by jurists over the issue of the fifteen-year grace period are striking in their similarity of the arguments, mostly related to waqf conflicts stretching over generations of beneficiaries, or orphans' money, and the like (5:421-22). What this episode shows—in a way that is reminiscent of the discourses on land, rent, and tax—is how point

by point confrontations were likely to occur between the qānūn (in the form of sultanic decrees) and Ḥanafī practice. In fact, for every law, decree, or "order," it was likely that the jurists would confront them with a complex line of opinions and arguments that were neither totally supportive nor against. The jurists' opinions presented a "rainbow" of arguments, finely graded and composed of varying hues and gray areas, and with so many twists and turns that at times it would look as if a counter-argument had been established against the official sultanic law. However, upon closer inspection, such an opposing view would appear merely as a formality, allowiong for many possibilities. In the case of the fifteen-year grace period, even though it did receive an overall juristic consensus, the multiple opinions and exceptions made it hard to enforce the rule in a straightforward manner. The paradox here is that the sultanic rule was meant to curb the judges' authority by making it difficult for them to support plaintiffs and play with cases that took forever to adjudicate: there was thus an awareness that time was an important factor—since evidence was mostly through witnessing. Yet, those same judges who were appointed by the sultan, and were at times perceived unfavorably by the jurists who looked down on them, had to follow those same jurists' recommendations in order to decide when not to apply the fifteen-year rule. Such ambiguities came from the jurists' middle-ground position between the judges and the bureaucracy, on the one hand, and as keepers of an old legal tradition, on the other. Their discourse therefore shifted from complete obedience to the law to a set of finely tuned opinions. Thus, as soon as Ibn ʿĀbidīn completes his discussion of all eight clauses, which in reality were like counter-arguments to the sultanic fifteen-year rule, he reemphasizes the accepted dogma that "obedience to the imām [or sultan] is a duty [*ṭāʿat al-imām wājibah*]" (5:422), and that the sultan ought to be looked upon for all practical matters as the supreme judge "whose ruling over two opponents should be executed" (*ibid.*).

From our perspective, it all amounts at being able, from such scattered material, to reconstruct the juridic and political framework of the Empire. If Ḥanafism was low at articulating a doctrine of sultanic power where the juridical would find its natural place, it was probably because of a general weakness in the Arab and Islamic political discourse. As long as power was something to be acquired and maintained by force whenever necessary, there was not much room left to work out a consensual framework with the "societies" of the Empire (or the *raʿāyā,* or *raʿiyya*), its populations and "subjects." In a strange way, political power becomes what jurists commonly refer to as a *ḥaqq ʿaynī,* or the "right of possession" of the tangible object. When political power therefore stands on its own, the so-called "intermediaries" among the nobility were no longer integrated within a higher political framework that would have bypassed their regional and familial allegiances. Such a local grounding was

indeed highly visible in the politics of the regional councils (see Chapter 9 *infra*). Similarly, the religious courts remained a regionally backed apparatus of justice surviving from its own internal networks rather than from a higher process of supervision and evaluation. The judge's allegiance for his sultan was therefore highly symbolic, and was an outcome of the fiction of the sultan as the Empire's first judge and legislator. Such images, however, in addition to the sultan personally appointing judges, had no effect whatsoever on any process of "centralization" that would have affected the judiciary. That was to come only much later—in the 1860s—when copies of the Napoleonic Codes began to circulate.

There is a similarity between the jurists' position on land and that of their critique of the enterprise of judging. For one thing, they did accept the massive state ownership of rural lands (see Chapter 4 *infra*); yet, at another level, they also did acknowledge the legitimate rights of those who worked on their lands for a period of time without, however, any "official" evidence of ownership. Similarly, in the enterprise of judging, jurists kept at the surface a soft language that went along with the basic premises of the system, but at another level, they undermined its legality by pointing to its corruption. Thus, Ibn ʻĀbidīn looked at "bribery (*rishwa*)" as a phenomenon that had become an inherent part of the system: under the euphemism of "produce (or yield), *maḥṣūl,*" judges were openly bribed either before or after the ruling. Already an earlier generation jurist, Jamāl al-Dīn al-Bazdawī,[17] had noted that "I am perplexed on the issue of whether to accept [the judges'] rulings because of the confusion, ignorance, and arrogance [*jarā'at*] I see in them. And I am unable to propose [a general request] of withholding execution because the people of our time [*ahl zamānu-nā,* meaning the judges] are all so. If I issue a fatwā invalidating [such rulings], that would render all rulings invalid. The judges of our time have spoiled our religion and the sharīʻa of our Prophet, so that all what is left of them is the name and the fee [*al-ism wa-l-rasm*]" (5:363). And Ibn ʻĀbidīn then adds his own views on the judges of the early nineteenth century:

> [Bazdawī's comments] were on the judges [of his own time], so what should we say on the judges of our own time who are worse than their predecessors because they think that everything that comes to them as yield [*maḥṣūl*], based on their own distorted allegations, was permitted by the sultan? I heard from some of them that the Mawlā Abū al-Suʻūd[18] issued a fatwā on this, and I think

17. I was unable to identify a Jamāl al-Dīn al-Bazdawī, who is quoted as such in the *Radd.* There is, however, a certain ʻAlī Bazdawī (400-482/1010-1089) who was a Ḥanafī faqīh in Samarqand, and another Muḥammad Bazdawī (421-493/1030-1100), also a faqīh and judge in Samarqand.

18. The Ottoman grand muftī Abū al-Suʻūd (or Ebu's-suʻud), who held his position between 952-982/1545-1574. On his views on rent and taxes, see Chapter 4 below.

> this is a disservice to him [*iftirā' 'aly-hi*] [...] Some associate the appointment for a judge's position with bribery [*man qassama akhdh al-qaḍā' bi-l-rishwa*], and this is now called *muqāṭa'a* or *iltizām,* so that a man of justice [*rajul qaḍā'*] has devoted to him a *nāḥiya* where someone pays him a known sum in order to adjudicate and make himself independent by keeping everything he gets as fees from the total income to himself [*wa yastaqill bi-jamī' mā yaḥṣulu-hu mina al-maḥṣūl li-nafsi-hi*] (*ibid.*).

And he later notes that many of the Ḥanafī *'ulamā'* of the school thought that "the majority of the judges of our time in our countries [*bilādu-nā*] are peacemakers [*muṣāliḥ-ūn*] because they were appointed to their position through bribery [...] Some Shāfi'īs express this by saying that what we have is a judge of necessities (*qāḍī ḍarūra*) since, from our knowledge, there is no judge but who bribes and was himself bribed" (5:428).

The unflattering image that is sketched regarding the judiciary is drawn in parallel to a common perception of the *iltizām* system. In fact, judging from the harsh descriptions above, both the appointment of judges and that of *multazim*s seem to have followed a similar if not an identical logic, and what could have indeed triggered the process of lowering their status (at least compared to earlier periods) was that both positions—judging and rent- or tax-collecting—were appointments of the sultan and his bureaucracy rather than an open competition. Thus, appointed judges, like their fellow *multazim*s, would be granted a *muqāṭa'a* over which they would be able to establish their "rule of law." In the language of the *iltizām* system, a *muqāṭa'a* was a "fiscal unit" that the *multazim* was in charge of and whose responsibility would be limited to collecting the *mīrī* from the peasantry. In principle, however, those fiscal units were open to the highest bidders, but in practice *multazim*s were increasingly pushed to purchase their way through. Similarly, judges had to get through the system, paid bribes to be appointed, and because of their non-familiarity with the subject matter, had to rely on their deputies and scribes to adjudicate. Because they had to bribe higher officials to be appointed, and also to be kept in their positions, judges imposed fees and accepted bribes to get things done: the totality of this "income" was what Ibn 'Ābidīn referred to as *maḥṣūl* and which was, according to him, more of a system of bribes than a genuine income. But since Ibn 'Ābidīn fails to distinguish between local, outside, and expert itinerant appointees, his general evaluation of the position of judgeship ought to be taken only as an overall appreciation that would become less helpful once we finesse over the details. In fact, as our discussion below on "the cultures of judges" shows, even though the dominant *'ulamā'* factions all contributed in one way or another to the sharī'a courts, appointees from outside the system kept pouring in, and with few itinerant experts receiving some of the highest appointments. In effect, if a more balanced

picture is worked out, corruption will still be there, but not necessarily limited any longer to a particular cause or group.

The Ḥanafī literature has devoted a great deal on the crucial issue of *rishwa,* that is, "bribing judges for the sole purpose of enhancing one's case," and how this method of payment demarcates from legally accepted "fees (*rasm,* pl. *rusūm*)," or "presents (*hadiyya/hadāyā*)" given to the judge either before, during, or after the trial. Some of these arguments were already introduced by Ibn Nujaym in one of his *rasā'il.* The *rishwa,* he argues, was prohibited in the Qur'ān, ḥadīth, and also by consensus among scholars, and was usually given to a ruler (*ḥākim,* in this case a judge) in quid pro quo for a *specific purpose:* so that the judge would side with the giver during the trial. The "present," on the other hand, "has no condition attached to it [*al-hadiyya lā sharṭa ma'a-hā*]."[19] Ibn Nujaym, however, skillfully separates between the action (and intention) of the giver and that of the receiver: "this bribery is unlawful for the taker but not for the payer [*al-rishwa ḥarām 'ala al-ākhidh ghayr ḥarām 'ala al-dāfi'*]" (*ibid.*), and as a rule it should apply for every taker/receiver who was placed in a position of "ruler, *ḥāhim,*" including the sultan himself. Thus, it was unlawful to pay the sultan a sum of money in order to promote a case that one placed in his hand for adjudication. Strangely enough, Ibn Nujaym finds a way, through a long *détour,* to accept a receiver's eagerness to take (*akhdh*) the *rishwa* in such a way that it would make it lawful. The taker/receiver (*al-ākhidh*) agrees with the giver on a semblance of a hire contract (*ijāra*) for three days or so in which "what he wants to be paid to him" becomes the "fee" or "rent": the idea here is to place the taker/receiver in some form of a "labor contract" where he is paid for a "labor (*'amal*)" he did to the payer. In other words, a "gift"-cum-*rishwa* is legal as long as it has been contractually settled as an *ijāra* contract, so that it would legally fall under the category of *māl mutaqawwam,* that is, as a thing with a commercial value. However, the jurists disagreed on whether to accept as lawful a sum paid by someone who came to the sultan to settle a matter and gave him money after the settlement was over: Ibn Nujaym thought it was lawful for the sultan to accept such a payment because it did not affect in any way his action towards that person in particular. On another matter, he sees a parallelism between a judge receiving money as a bribe and "borrowing" from someone involved in a lawsuit. "Borrowing (*istiqrāḍ wa isti'āra*)" could well achieve the same functionality of a bribe, that is, affect the process of a lawsuit, in particular if the judge were to be dishonest or not careful enough.

19. Ibn Nujaym, "Risāla fi-l-rishwa," in *Risālāt mujma'a li-Ibn Nujaym,* MS. 5105, microfiche 7077 (Damascus: Asad National Library), 4b.

Be that as it may, the emphasis on bribery could shed some light on some of the sharī'a court procedures. With the kind of judges that the jurists had in mind, one wonders how such a level of "corruption" would have affected the integrity of the judicial decision-making process: if bribery was that common, could the disputants have made use of the system in such a way that was only convenient to them? The first question that comes to mind when going through many of the sharī'a court documents is how "genuine" those cases were: that is, whether the "litigations" were true or fictitious and staged in such a way so as to look like the outcome of a genuine conflict, but whose real motive, however, was to secure a final ruling that would act in lieu of a contractual settlement (in particular in an apparent effort to "consolidate" familial properties) (see *infra* Chapter 5). The "Book of Judging" contains an explicit warning against faked cases in which the disputants only *claimed* to be genuine litigants: "If the judge knows that the heart of the matter is not like what it appears to be [*bāṭin al-amr laysa ka-ẓāhiri-hi*], and that there is no conflict and no litigation [*lā takhāṣum wa lā tanāzu'*] between the disputants on the same issue, he should then refrain from listening to this lawsuit since there is no obligation for the system of justice [to devote itself] to [cases like this], and it is illegal to dupe [*iḥtiyāl*] the system in matters like that" (5:354). Such a strong warning could be an indication that such cases, where "litigation" was a pure hoax, were indeed numerous. The problem, however, is to be able to determine a genuine case from a faked one. That will not be an easy task especially since all suspicious cases did *formally* follow all the accepted legal rules, and it remains uncertain whether Ibn 'Ābidīn would have considered what we have labeled in this study as "fictitious litigations," or "procedural fictions," as faked and illegitimate cases (see Table 2-2 *infra*). To use a common philosophical and legal language of the period, at the surface of things (*ẓāhir*), there were no violations of the law, but beneath the surface, how things effectively *were* (*bāṭin*), one could look at the same "litigation" in a different light: for instance, the fact that many of those litigations seemed purely ritualized, routinized, repeating one another with the same jargon, tricks and twists, to the smallest detail; and, above all, the testimonies of their witnesses were never challenged and always accepted at face value by the opposing party, and hence by the judge himself. Such indications, among others, could well indeed constitute signs of the duped trials that Ibn 'Ābidīn did warn against. Considering, however, that judges were generally advised "to rule based on appearances [*yaḥkum bi-l-ẓāhir*]" (5:365), how would it be possible for them to look at what was going on "beneath" the surface? But the real problem, from the standpoint of our study, lies elsewhere. In fact, the widespread phenomenon of "procedural fictions," which had

become standard in the sharī'a courts,[20] cannot be described purely and simply in terms of "bribery" and "corruption," and it is anyhow uncertain which precise cases Ibn 'Ābidīn had in mind, if any, when coining such terms. Fictitious litigations became indeed so common at a yet to be determined period,[21] and so widespread in both civil and criminal procedures, that they cannot but be perceived as legal subterfuges accepted within the system aimed at expanding the possibilities of contractual settlements.

While maintaining its abrasive tone, Ibn 'Ābidīn's text mixes the facts with what makes them valid. Even though many of the phenomena he was depicting did not apply anymore to his own time—for example, the *kharāj* taxation system (see Chapter 4 *infra*)—his insistence in keeping up with the tradition while discussing such "obsolete events" as if they were part of his own society, is nevertheless staggering. Not only does the "Book of Judging" not contain any reflection on the Ottoman qānūn, but, moreover, the problems caused by the interaction of two legal systems with different foundations are only alluded to, and one could foresee several other major lacunae in all eight volumes of the *Radd.* To use Jürgen Habermas' terminology, there was a high level of "counterfactual imagination" in Ibn 'Ābidīn's text, which, to be sure, is characteristic of such discourses in general. That kind of imagination is by all means a necessity for any type of discourse, as it enables individuals to keep believing in things that do not exist anymore or that never existed for that matter.

What was therefore the meaning of the "ideal of judging" and how did it relate to the historical reality of the Ottoman system? At the most general level, there were the "basics" of adjudication that made it possible to proceed with a decision making, and which for the sake of simplicity could be reduced to seven elementary evaluations: 1) the accumulation of proof and evidence (*bayyina*); 2) the confession or admission (*iqrār*) by the opposing party of the other's allegations; 3) taking oath (*al-yamīn*) in order to confirm a claim or allegation; 4) the abstention or refrainment (*al-nukūl*) from taking oath, which in itself could be enough "evidence" that the other party made the right claim; 5) the "gracefulness" and elegance (*qasāmah*) of the arguments presented in court; 6) the knowledge (*'ilm*) of the judge and his ability to make the right decision; and 7) whether all of the above were provided with enough clear and

20. See Table 2-2 on "fictitious litigations," and several of the cases analyzed in detail in Chapters 3, 5 and 6.

21. They were already very common since the beginning of the nineteenth century, but their origins remain uncertain until more legal research is completed for the previous centuries.

reliable evidence (*al-qarā'in al-wāḍiḥa*)[22] prior to the final ruling (5:354). At all levels, therefore, involving judicial decision making—in particular items (2) to (4)—the system faced the "facts" in a particular way, certainly very different from modern systems of justice. In the above seven steps, the key part was that of "accumulation" of "evidence": What was exactly meant by "evidence" and how did it "accumulate"? If "evidence" is reduced to "factual matters" whose importance was crucial to the case in question, then those facts were accepted in court not through any "investigative" process but more as an assortment of ethical, moral, and religious conventions that determined whether a witness was reliable or not, or whether the opponent's contestation of a testimony was valid or not. In fact, a testimony was in general honored as long as it was left unchallenged by the opposing party. In other words, there was no "method" that would have constructed an investigative process to determine the truthfulness of statements within a testimony. Statements were not looked upon as objects of speech (signs) whose veracity had to be confronted with facts "outside" their own being. Items (2) to (4) in particular were non-rational modes of accumulating evidence in that they honored traditional modes of oracular justice (e.g., oath-taking) for receiving a truth-claim that could not be proved on purely rational grounds.

If anything holds true in the "Book of Judging" it is certainly the digressions on the complementarity between *iftā'* and *qaḍā'*. Some sharī'a court cases did overtly rely upon a fatwā drafted by the muftī of Beirut or Damascus (or the locality of the plaintiff or defendant), and typically the text of the fatwā would be inserted right at the end of the document, after the case, the testimonies, arguments, and counter-arguments have been fully argued, and before the judge's final ruling (see *infra* Chapter 7). In itself, such an arrangement gives the impression that the fatwā was indeed the last resort—the opinion that the judge badly needed before making his own mind. (The presence of a fatwā is in itself enough evidence that the case was not fictitious; theatrical litigations were typically more routinized and avoided the small level of "unpredictability" that the fatwā could have brought in.) Fatwās were either requested from a muftī by one of the disputants (in most cases, the plaintiff) or by the judge himself. So the purpose of the fatwā was to strengthen the viewpoint of one of the litigants, even though, it should be kept in mind, fatwās rarely did address the case as a whole: instead they focused on one or two elements only. In one such case, for example, the fatwā dealt only with the defendant absenting

22. *Qarā'in* (singular: *qarīna*): "verbal or nonverbal indicators that clarify a part of speech extraneous to themselves; a given or presumed set of facts underlying a particular situation; circumstantial evidence" (in Masud, et al., *Islamic Legal Interpretation,* Harvard University Press, 1996, 410).

himself without notice for a long time from court rather than with the central issue which was the disputed land (C 7-2). Because of their specific character, and because their presence was an indication that the usual procedural routines stumbled at some point, fatwās ended up being the only element of novelty within texts with predictable syntax. They also helped in bridging the "gap" whenever the traditional opinions were either confusing, out of date, or else failed to provide any clear answer (silence of the law).

Because of their essential nature in court cases, fatwās were a complementary side to judicial decision making, on the one hand, but also created, on the other, tensions and rivalries within the judicial apparatus. For one thing, muftīs were of a higher status than judges; their opinions therefore mattered much more and provided crucial answers to stumbling cases. Moreover, because Ḥanafīs were "open" in recognizing well established customary practices,[23] it was usually the muftī (and seldom the judge) who had to provide the adequate line of reasoning that made a custom legal. Due to the importance of muftīs and their higher rank in the judiciary, disputants summoned them with questions, hoping for a written responsum in return; the disputants would then force their way through into the court, a way to intimidate both opponent and judge: "It has become a habit today that everyone with a muftī's fatwā in hand would assail [*istaṭāla*] his opponent and defeat him by simply uttering that the muftī gave me a fatwā, so the law is on my side and my opponent is an ignoramus who does not know what is in the fatwā. It is therefore necessary that the muftī be fully alert [*mutayaqqiẓ-an*] and knows the tricks of people and their intrigues [*dasā'is*]" (5:359). Such attitudes suggest that disputants typically sought the opinion of a muftī first, and tied their success in getting a responsum with the possibility of another success in court. Ibn ʿĀbidīn thus urged muftīs to look carefully at the matter in question and suggested a few precautionary measures to limit the lies and intrigues of disputants. He thus proposed that muftīs meet with both adversaries rather than one of them, listen to the two sides of the story, be careful of faked testimonies, and then question the disputants directly rather than through their representatives; the latter were professionals and had therefore more experience in cheating and lying.

Ibn ʿĀbidīn was probably not as harsh with muftīs as he was with judges, but his comments were not that complimentary either. Muftīs are described as generally being in a state of "inadvertence (*ghafla*)" from which "a great deal of damage has ensued [*yalzam min-hā ḍarar ʿaẓīm*]" (*ibid.*). The role of the muftī is closer to that of a "storyteller (*rāwī*)" than to a witness or a judge, but

23. See above Chapter 1 on customary law.

his storytelling, however, has to be performed in writing—from the requester to the replier (the muftī)—in order to avoid any confusion.

> There is no doubt that as long [the request was made to the muftī] in writing, and he did reply [in writing], then the fatwā is legal. But if he has been dedicated to fatwās [*manṣūb-an li-l-fatwā*] with common people, women, Bedouins [*a'rāb*], and others, coming and posing questions to him, he should then be able to listen well because it is not possible that every requester writes down his question. The disputants would come to him and one of them would speak in such a way so as to show that the law is not on his side, but if the muftī did not hear that from him and then issues a fatwā based only on the part that he was able to listen to, the right of the [inquirer's] opponent is then lost. This is something that I often witnessed, and we should not hesitate to declare that such a person is not fit to be a muftī, in particular if a judge is waiting for his reply so that he could complete his ruling, because the damage, created [by such errors] could be great. (5:360)

Even though this passage is limited to a muftī's ability to listen properly—and apparently in its two sides: the physical and figurative—it does point out, however, to two broad criticisms that Ibn 'Ābidīn's texts often reiterate. In fact, seen in conjunction with the *Rasā'il,* the implications regarding the *iftā'* institution as a whole are twofold: 1) Due to the importance of custom in the "renewal" of Ḥanafī practice, muftīs took *ipso facto* the role of *mujtahid*s within their community. When an opinion had to deviate from what was commonly accepted as *ẓāhir al-riwāya,*[24] it typically was furnished by a muftī's fatwā: muftīs were in fact always pressed with questions originating directly from the courts, and their fatwās thus not only operated with a tighter grip on facts than legal doctrines, but they also signaled what may have become obsolete in terms of legal reasoning. Muftīs must therefore know a lot, not only the legal doctrines of their own school, but more importantly, the customs, habits, and daily languages of their own communities. 2) The muftīs' alleged weaknesses were complemented by an overall sloppiness in preparing and drafting their fatwās, and a carelessness in dealing with and listening to disputants. Written questions and responsa were much more reliable, yet, because they were not required by law, disputants often opted for an oral route, which was more uncertain, but at least accorded them an avenue of redress whenever they failed to receive a straightforward written responsum. The writing part will come again and again in the *Radd,* in particular on the role of writing, signs, signatures, and seals, for maintaining the *sijill*s.

But how much of a *mujtahid* was a muftī? And was the *ijtihād* and *tajdīd* limited to him personally, or could they have been the judge's qualities as well?

24. That is, Shaybānī's six works of *uṣūl,* see *supra* Chapter 1.

It was commonly accepted[25] that a judge could issue a fatwā to individuals who were not disputants in his *own* court, in other words, the judge would act as muftī towards individuals who were not asking him to act also as a judge: either a fatwā or a *ḥukm,* but not both. Others have limited the *iftā'* of the judges to few areas related either to religion (*diyānāt*) or else to pecuniary transactions (*mu'āmalāt*) (5:360). But whoever issued a fatwā, whether a muftī or a judge, there were rules to be followed and hierarchies to be respected. The question arises at all three levels of the judicial apparatus—legal doctrines, fatwās, and courts—as to whose opinion, among the three founders, should have priority over the other two if their opinions diverge regarding a specific issue, as is often the case. It was commonly agreed that whenever one of the disciples' opinion was in accordance with the founder's own, then that was the legitimate opinion. But it became more confusing when both disciples disagreed with their master: the latter's opinion could be favored over the other two, or a choice was possible, or, as a final possibility, the disciples' opinion would get full support whenever it was seen as a result of the "changing times (*taghyīr al-zamān*)," such as approving a prevailing view in judging (*ẓāhir al-'adāla*) on the opinions of the late jurists on matters ranging from sharecropping (*muzāra'a*) to specific kinds of transactions (*mu'āmala*) (*ibid.*). The same argument—that new opinions that did not match those of the founders were *de facto* created as a result of changing customs—was put forward to underscore the role of custom in forcing new arguments and opinions on Ḥanafī practice.

Once such distinctions among the three founders are worked out, other ones among jurists become all related to distinctions between *muqallid* and *mujtahid.* A *mujtahid muṭlaq* is an independent interpreter who, having rooted his knowledge in the Qur'ān and sunna, develops an ability to clearly discern all indicators in textual sources (*ṣāra lahu malikat al-naẓar fi-l-adilla*) and to derive legal rules for novel cases (*istinbāṭ al-aḥkām*) (*ibid.*). By contrast, a *mujtahid muqayyad* works within limitations imposed on his interpretations and is therefore unable to introduce novel arguments. So, a *muftī mujtahid* receives his reputation from the power of his interpreting the legal rules (*quwwat al-mudrak,* also: *al-adilla*), even though it was commonly accepted as "sounder (*aṣaḥḥ*)" that a *mujtahid* was a learned jurist who just practiced the art of *tarjīḥ,* that is, setting aside all opinions and preferring one over the other: "we follow what [the *mujtahid*s] favored and established as if they completed their fatwās in the lifetime [of their predecessors]" (5:361). The idea of interpreting a text and creating opinions and preferences out of a line

25. In the *al-Ẓahīriyya,* for example.

of textual predecessors as if the interpreter lived in the lifetime of those authors (*kamā law aftū fī ḥayāti-him*) is similar in modern law to interpretations that follow "an original author's intention." With such a view, which emphasizes the original author's intention, there is little room for even accepting an "adaptation" of the text to novel problems: interpretations are helpful, within this line of reasoning, in clarifying the older canonical texts and in selecting—by creating preferences—the relevant fragments for a contemporary inquiry—and only the genuine *mujtahid*s are capable of doing so, while the others are just "followers (*muqallid*s)." Ibn ʻĀbidīn quotes at this point one of the last major Ḥanafī jurists who preceded him, Khayr al-Dīn al-Ramlī: "The muftī is the true *mujtahid* and everyone else follows [*nāqil:* transmitter] his opinions. So how is it possible for us to create fatwās based on the imām's opinion when the jurists themselves provided contradictory ones? We can only accept their fatwās and nothing else" (*ibid.*). In one of his *rasā'il,* Ibn ʻĀbidīn expresses a similar opinion that he then reiterates in the *Radd:* "What [is commonly accepted] is what the jurists of the school have agreed upon, whether it follows or not the opinions of the imām" (*ibid.*). The Ḥanafīs thus gave preference to their own line of interpreters and to the consensus that was originally based on conflicting interpretations. A juristic typology favoring all three founders, on the one hand, and an imposed categorization among *mujtahid*s and *muqallid*s, on the other, was at the root of every consensus on each issue. Such a typology was so crucially important for the school's survival that even the imām's sole power could not possibly have undermined it.

What was said of muftīs and their ability to pose novel interpretations was also in principle true for judges who were, in turn, divided among *mujtahid*s and *muqallid*s. A *mujtahid*-judge had to look carefully at the Qur'ān and sunna, poise over the opinions of the most reliable of scholars (which, in effect, have replaced the scriptures as a source for precedent), and check which ones are worthy of *tawātur* (concomitant, and therefore binding opinions), before selecting among all opinions only those most relevant to the case at hand. However, judicial decision making remained a hidden phenomenon and a well kept secret within the sharīʻa courts themselves and was thus never fully assimilated at the doctrinal level. That should become more evident once we discuss our cases in the following chapters.

The followers (*muqallid*s) adhere to the opinions of the genuine interpreters and innovators (*mujtahid*s) through a process described as "reference to the tradition" (*naql al-kalām,* literally: "copying speech," sometimes referred to as *al-tanaqqul ʻan al-mujtahid*). There are two alternatives (*ṭarīq*s/*ṭuruq*) for a follower to "adopt" from any innovative interpreter: either by relying upon an "authoritative source (*sanad*)," or else by selecting (*ya'khudh*) from a well known book (*kitāb maʻrūf*) that circulates around, such as the works

of Shaybānī or the other founders, or those having achieved their status (5:366). Those should attain the "status of a concomitant and binding event [*manzilat al-khabar al-mutawātir*]" (*ibid.*), meaning incorporated within Ḥanafī dogma. For this reason, "copies of Shaybānī's works outside his six *uṣūl* [*nisakh al-nawādir*][26] in our own time do not enjoy the same status as [the originals left by] Muḥammad [Shaybānī] and Abū Yūsuf because they neither received the recognition [*tashtahir*] of our time nor our localities [*diyāru-nā*], and did not circulate widely enough either [*tatadāwal*]" (*ibid.*). On the other hand, references to Shaybānī's less authoritative *nawādir* would be taken into consideration if already validated within the more well known works of Marghīnānī's *Hidāya* and Sarakhsī's *Mabsūṭ* because that would imply "placing our confidence (*ta'wīl*)" in them; in other words, the reliance upon the lesser well known *nawādir* works, which have only circulated in untrustworthy copies, but which have been quoted and "accepted" in the more known canonical works of the school, is what brings the *nawādir* back to life—only through scholars who have achieved the status of the founders.

Thus, at several discursive levels—the fiqh, fatāwā and sharī'a courts—all three systematically relied on past traditions from the school; but while the process of "authoritative reference (*naql*)" was fully "archived" for the fiqh and fatāwā, it remained obscure, if more secretive, in the procedures of the courts. In fact, it was common for jurists to represent their school's practice as perfectly well integrated, so that opinions were carefully categorized and selected in such a way that any scholar would find his way by following the proposed remedies.

By reason of the use of language, Habermas describes how discourses transcend themselves. What makes the self-transcending of the discourses possible are the idealizations and the contrafactual assumptions.[27] Idealizations help individuals *at different times* to refer to the same thing: in other words, *time stands still* at the discursive level while the overall *historical* situation alters. Thus, for example, a major condition set forth among Ḥanafīs when approving an opinion or text as part of the canon was their *tawātur,* that is, the *frequency* with which they tended to circulate from one text to another: what the canon was therefore concerned with was the *iterative* character of its texts. As Niklas Luhmann noted, "The idealizations continue to be used in the sequences of communicative actions, as if they were always the same. Formulated in Derrida's terminology, it is a question of *répétition,* not of *itérabilité.* But

26. The *nawādir* ("rarities") for the Ḥanafīs refer specifically to all Shaybānī's works that are not included among the six *uṣūl* in the *Ẓāhir al-riwāya.*

27. Niklas Luhmann, "*Quod Omnes Tangit:* Remarks on Jürgen Habermas's Legal Theory," *Cardozo Law Review* 17 (4-5 1996): 883-900.

in reality the overall situation alters—*différence!*—and precisely in linguistic communication from moment to moment. Something said becomes past; that which lies further away thereby moves closer; one regrets and can only mend; one notes too late what one should have said. The weight and appearance of the idealizations necessary for communication alter all the time."[28] Thus, the iterative character of the canonical fiqh texts is indeed more concerned in *répétition* than *itérabilité:* it is by indefinitely repeating the same opinion from text to text, and by quoting (or referring to) the same textual reference from text to text, that an "author"-text becomes recognized as part of the canon. But is the fiqh mainly concerned with the *frequency* of such repetitions or is it *repetition* as such that matters the most? What repetition brings to the fiqh is a sense that the idealizations that matter most for its survival are *identical* to the ones posited for the earlier Islamic periods—time stands still and things will be always the same: "identities *condense,* and in ever new situations they are *reaffirmed* and must be correspondingly *generalized*" (Luhmann, *ibid.*). In other words, the *tawātur* of opinions and texts—a ritual that insured their canonization within the school—implies repetition, identification, reaffirmation, and generalization. The fiqh thus protects itself from its historicity through a process of doubling and idealization.

The discourse of the courts persevered in its being in exactly that same way: it too doubled reality by means of idealizations and contrafactual assumptions. The procedural fictions of the sharī'a courts tremendously limited which cases were worthy of a judge's examination; it also reduced to its bare minimum direct- and cross-examination, thus limiting the impact of speech while subjecting it to a discourse that fits within the Ḥanafī juristic representations. The textual representations of the court sessions left little room to the *parole* of the social actors, and "paraphrased" their utterances in such a way that they would be subsumed under the general formula in which a particular "case" did fit, namely as a "case" worthy of examination in court.

To quote Luhmann once more, "Texts and cases are highly selective limitations of communication set free in the legal system by the process of differentiation" (*ibid.,* 894). One should add, as a reminder, that cases, while being the factual element of the system, are not in themselves facts but texts. Indeed, a legal case transforms its facts into texts, and for social scientists, the logic of judicial decision making could only be reconstructed by keeping an eye at both—textual—levels: the cases and doctrines. For one thing, even though the structure of communication in each is not necessarily the same, cases and texts do presuppose each other's discourse and *act* in accordance with such an assumption.

28. Luhmann, *"Quod Omnes Tangit,"* 888.

The textuality of the cases is first of all determined in the way they are recorded on paper and how they got to be organized within a register. Then comes the structure of discourse and its syntax. Court cases in Ottoman Beirut and Damascus were recorded in "registers [*sijill*s]," described as "the book of the judge [*kitāb al-qāḍī*]" (5:369). The judge kept a "record [*maḥḍar*]" of each case in which "he had to write what took place between the two disputants from their avowals to denials, in addition to a ruling based on evidence or abstention [from taking oath] [*al-ḥukm bi-bayyina aw al-nukūl*] so as to reduce suspicion [*'ala wajh yarfa'u al-ishtibāh*]" (*ibid.*). In addition, there were also a number of terms such as *ṣakk, ḥujja,* and *wathīqa,* all of which denoted signed documents (or deeds) by the judge which he delivers to the disputants (or one of them). Each document should in principle include similar (if not identical) summaries of the cases that the judge keeps in his own register. However, "what is kept [in the register] of the judge about the event [*wāqi'ah*] does not usually contain his signature (*khaṭṭ*), while a *ḥujja* does include the judge's seal [*'alāmat al-qāḍī*] on the top and the signature of the two witnesses[29] right at the bottom" (*ibid.*). But despite the copies provided to the parties involved, or to the ones who came to the judge asking for a *ḥujja* certifying a purchase or hire, what judges draft in their registers remains the most reliable source of information "because the judge's register cannot be usually counterfeited since it is kept in secure hands, contrary to [a document that] an opponent possesses" (5:370). For this reason, it was permissible for a judge to rely on the registers of his predecessor (*al-ma'zūl:* removed, dismissed, expelled) even if he chooses not to take the latter's opinions for granted and even if all witnesses had died. If a judge is, however, adjudicating on a waqf case, he should not rely, in order to be certain of the veracity of the document at hand, on the signatures of previous judges since those could be easily forged. Judges should therefore only trust—in particular for waqf cases which have follow ups from one generation to the next—their own registers or those of their predecessors: such a step was indeed looked upon as an *istiḥsān,* that is, a matter of preference, whenever possible; thus "working with what was kept in the registers of the judges was a matter of preference [*al-'amal bimā fī dawāwīn al-quḍāt istiḥsān*]" (*ibid.*). That was the only way, in the case of waqfs in particular, to keep up with "the progress of time [*taqādum al-zamān*]"

29. Ibn 'Ābidīn's text refers to "two witnesses' signatures (*khaṭṭ al-shāhidayn*)" rather than to "the witnesses' signatures (*khaṭṭ al-shuhūd*)," even though the latter would have been a more correct description for the majority of cases. In fact, two witnesses were needed to corroborate any single piece of evidence, so a case would usually end up with a minimum of two witnesses.

and follow the case from one generation to the next. In short, for any case, document, or *ḥujja,* the overall safety rule was that only the text inscribed in the judge's registers should be followed; that was safe enough to guarantee the authenticity of a ruling or any document for that matter, even if all witnesses had died by the time the veracity of a document was brought up.

The activity of a judge is therefore fully discursive. He has to *write* down what he knows about the case not simply to protect the veracity of cases and documents, but, more importantly, "to memorialize the fact-event [*li-yaḥfaẓ al-wāqi'a*]" (5:433). This process of memorization was correlative with the judge keeping his registers properly in order. Judges often need to send their rulings to other judges in far away provinces and cities, and the rule here was, again, the primacy of the *sijill* over the forwarded document. One of the many instances that the writing memorialized was what witnesses said. But whether witnessing was performed in front of a present opponent (*khaṣm ḥāḍir*) or one that was absent, "there is no [valid] testimony without prior knowledge as to what the witnessing is all about [*lā shahāda bi-lā 'ilm al-mashhūd bi-hi*]" (*ibid.*). Thus, for example, knowledge as to whom a loan was granted was in itself not enough, had it not been complemented by other more relevant details, such as the amount and conditions of the debt. Such details could be important in particular when the case had to be transmitted to another judge. In that case, witnesses had to "memorialize (*ḥifẓ*)" their original testimony, and in order to do so "it would be better for them to keep a copy [*naskha*] [of the judge's ruling] so that they bypass memorization. It is in fact essential to remember [what has to be uttered from] the time of the testimony [*waqt al-shahāda*] to that of performance [*waqt al-adā'*]" (*ibid.*). Most probably, though, the "time of the testimony" either refers to "when the witness saw what happened," and thus the "time of the performance" becomes that of the testimony in court in presence of a judge; or it could refer to the first testimony, while the second is the one related to the "time of the performance."

"Memory" is more an act of "memorization" than of "remembrance." In fact, *ḥifẓ* is—literally—memorization rather than memory: the writing of the judge "memorializes the fact-event" rather than remembers it, and witnesses memorialize their testimonies—or had them memorialized in the process of the judge's writing—rather than remember "what effectively took place." Memory brings in fact not only an imperfect reconstruction of a past event, but also the many "viewpoints" of the perceiving subject—to the point that accurate/inaccurate and subjective/objective receive different meanings in respect to memory—something that the art of the novel has mused upon a great deal. The sharī'a courts, however, were apparently not interested in Faulknerian narrators and wanted their witnesses to deliver *identical* testimonies whenever they had to do so, and ones in conformity with their own party's claims. As a

matter of fact, the system as a whole maintained its dynamics through a process of *repetition:* of opinions, documents, and testimonies; in other words, there was a fear of *différence.* This might explain why witnesses were not subject to direct- or cross-examination since any process of questioning would bring the whole issue of speech, "viewpoints," and memory that modern courts have learned how to severely restrict.

It was the "seal (*khatm*)" of the judge that in principle acted as a guarantee to the discursively reproduced fact; hence the strict regulations: "a seal should not be considered when placed on the verso of the [judge's] leaf [*kitāb:* book, document, message], so that if the judge's seal is damaged [*inkasara*] or if the document is already open [*manshūr*], it should not be accepted" (5:433). In addition to the seal, the names of the disputants had to be associated not only with that of their father and grandfather, but also with any "nickname" or anything they were "known for": that was originally one of Abū Yūsuf's opinions, that "the name [*ism*] is in itself not enough without what the person is known for [*lā yakfī bilā shuhra bi-kunya*]" (5:434). Finally, the judge should include what he found was "the right cause (*al-ḥaqq*)," the witnesses' names, or at least their testimonies, in addition to the date (an absolute requirement, without which the document would be invalid).

Thus, at two different levels, the system was concerned in reproducing itself while strongly identifying with its past. There was first the discursive level that concerned itself with the structure of doctrinal opinions, fatāwā, and rulings, and their valid use. Then came a materialistic (physical) concern, that of ensuring that the entire contents of a case were safely transmitted from one individual to another, from one place to another, and from one generation to the next. Writing opens the possibility for forgery, and the entire system was haunted by the idea of faked documents circulating all around. As Ibn Nujaym stated in *al-Ashbāh,* "writing cannot be trusted [*lā yu'tamad 'ala al-khaṭṭ*]" (quoted in the *Radd,* 5:435), so that, say, a waqf document would not constitute the basis for a ruling unless it was signed by other judges. The same applies to practically every document that was used as "evidence": sultanic orders, memos from governors or judges, and the like.

Besides bookkeeping and an excessive care for the authenticity of documents, judges had to worry about procedural matters: how to set a case properly, listen to the disputants, accept or reject testimonies, and the like; but obviously what it all boiled down to was the single most decisive act of decision making. Judges were tested not only on their knowledge of the law, but also on how they managed to fit their case into the body of doctrinal opinions. The process of *selecting* from a body of opinions that stretch over several centuries, and that often contradict one another, is probably the most decisive step in decision making. Judges had to step first into the ambiguous

dividing line of *mujtahid*s versus *muqallid*s, and since they were generally recommended to seek for a *mujtahid*'s opinion rather than be one themselves, it all ended up figuring which *mujtahid*'s opinion was the most acceptable. There was also the other possibility of seeking for a *muqallid*'s opinion who, in turn, had to rely on a *mujtahid.* In that case, the judge would have saved himself the trouble of choosing a *mujtahid* all by himself, but it all amounted in knowing what was going on in the world of *ijtihād.* Broadly speaking, what made a *mujtahid*'s opinion acceptable within the Ḥanafī canon was its recurrence (*tawātur*) from one text to another. In other words, rather than ask, Does this opinion make sense?, the more obvious question that judges and muftīs had in mind was: Where does this opinion come from and which texts accept it as part of the canon? Where does it fit within the Ḥanafī juristic typology?

Following his predecessors, Ibn ʿĀbidīn divides the judge's ruling (*al-ḥukm*) into three categories. The first are all rulings to be revoked (*yu-radd*) and not be executed (*lā yu-naffadh*) because they are contradictory (*khālafa*) to the doctrinal texts (*al-naṣṣ*) and the consensus of scholars. The second category, which gets executed under any condition (*yumḍa bi-kulli ḥāl*), is when there is a disagreement over a particular issue (*khilāf fī al-mas'alah*) that might be the cause of a ruling (*sabab al-ḥukm*), that is, the disagreement is not "in the ruling itself [*lā fī nafs al-ḥukm*]" (5:394). In this category, which is defined as "the ruling as being the object of *ijtihād* [*al-ḥukm fī maḥall al-ijtihād*]" (*ibid.*), the act of *ijtihād* is not in the ruling itself but what precedes it, so that the *ijtihād* is over the conflict on an issue. Suppose, for example, that a Shāfiʿī judge accepts the testimony of an individual who first committed a wrongdoing of defamation (*al-maḥdūd bi-l-qadhf*), and then asks for forgiveness (*tawbah*), should a Ḥanafī judge, who had the same case transferred to him, accept the testimony of that individual if, in particular, as a Ḥanafī, such a testimony should be void? He should, according to Ibn ʿĀbidīn, because the conflict between the two judges was over an issue that caused the ruling and not on the ruling itself. The first Shāfiʿī judge ruled based on the view of his own school over the issue subject to the *ijtihād* (*al-mujtahad fihi*); once he passed his own judgment over the testimony issue—rejection or acceptance?—he proceeded with the ruling. So, a Ḥanafī judge, who took the case later, should accept the testimony and proceed with his ruling too. In other words, the logic here is that the first judge, prior to his final decision, performed a legitimate act of *ijtihād* on a specific controversial issue—should the testimony be accepted as evidence for the ruling or not?—and since the controversy is not on the ruling but on what preceded it, then any other judge should also accept both the *ijtihād* and ruling. The sharīʿa court records, and those of Damascus in particular, show a clear trend of individuals presenting

their case first to a Shāfi'ī or Ḥanbalī judge who would give them a positive ruling, prior to its ratification by a Ḥanafī: the reason being that the Shāfi'ī or Ḥanbalī schools accept opinions that the Ḥanafīs do not (on the issue of long rents, among others) (see Chapter 3 *infra*). So, when the "object of *ijtihād,*" which led to the ruling, is subject to controversy, the ruling itself should not be contaminated with the same controversy. That sounds indeed like an illogical argument—the effect of a controversial cause should not be itself subject to controversy—but it only makes sense within policies adopted among the madhāhib: a sort of legal device to avoid a substantive reformulation of basic notions.

A possible reason for what appears "illogical" comes from the fact that, as far as adjudication goes, only controversies over the ruling itself matter, and not on what preceded it. This is what the third category is all about: "the ruling that is subject to *ijtihād* [*al-ḥukm al-mujtahad fihi*]" (5:394). The opinions are here apparently divided: Should a second judge accept a controversial first ruling? Basing himself on the opinions of Zayla'ī and few others, Ibn 'Ābidīn thought that such rulings should be stopped and not executed (but several others said that it should). Obviously, the problem here lies "in the act of judging itself and the controversy it created [*nafsu al-qaḍā' mukhtalaf fihi:* judging itself is the subject of controversy]" (5:395). The system, therefore, operates within a separation between the *ijtihād* over an issue (*mas'ala*), on the one hand, and over a ruling (*ḥukm*), on the other. A new and controversial opinion over an issue should not lead to a controversy over a ruling based on this issue, while a controversy over the ruling itself might render it invalid. The emphasis is therefore on the ruling itself, and a judge has to accept a colleague's ruling as long as it is not controversial, that is, the result of an *ijtihād.* The logic here is that judges should restrict themselves to accepting or rejecting each other's *rulings* rather than the *opinions* that made such rulings possible—or *caused* them, as the jurists would say: the latter were the work of jurists, and even though judges were not forbidden to exercise their own independent reasoning, they rarely did so and relied on the opinions of other *muqallid*s or *mujtahid*s, whether jurists or muftīs. Judges should therefore be fully knowledgeable about the conflict of opinions among jurists (*ikhtilāf al-fuqahā'*).

The procedural fictions conundrum

Among the cases that we will be analyzing in this book, many were structured around what I refer to as "procedural fictions," or "fictitious litigations," and both terms are used interchangeably with no significant difference in

meaning.[30] Ḥanafī practice, beginning with the work of Shaybānī, is known to have acknowledged the notion of "legal subterfuges," or *ḥiyal,* as an inherent part of both legal doctrine and judicial decision making. Those consisted mostly, though not exclusively, of procedural matters that tend to bypass a parochial doctrinal requirement by creating a court procedure (or an argument, for the fiqh manuals) that would, on the one hand, give the impression that doctrine has been closely followed, while in effect that same doctrine has been bypassed, on the other. Indeed, procedural fictions—or fiction[31] *tout court*—are common to many legal orders, in particular the ancient ones, such as the

30. Most Ottoman historians either ignore legal fiction completely, thus opening the way for a literal interpretation of the sharī'a courts texts, or else tend to think that it is mainly a device to conceal (and hence transmit) property or other valuable assets. See, for example, Margaret L. Meriwether, *The Kin Who Count. Family and Society in Ottoman Aleppo, 1770-1840* (Austin: University of Texas Press, 1999), 14: "Much of the value of [the sharī'a courts] sources lies less in the final decisions rendered by the qadis and more in the issues raised and detailed information provided. Moreover, whether a decision was implemented can be confirmed in some cases by subsequent entries in the registers dealing with the same piece of property. A more complicated issue is that of legal fiction. It is possible that fictitious contracts or property sales were registered to serve the particular purposes of the parties involved. For example, a wealthy merchant might register the sale of property to a religious leader to avoid the threat of confiscation, without the property ever changing hands in reality. This type of methodological problem has been raised in the case of historians using notary records in Renaissance Italian cities. We have no way of knowing whether such legal fictions took place nor any means of weeding them out if they did. It is important to note the problem, but we must simply live with the doubt." Once reduced to a device to protect or transmit one's property (e.g., the threat of confiscation), legal fiction becomes a technicality rather than a procedure. In effect, legal fictions generally result from the *procedural limitations* inherent within a particular system, and the difficulties that such limitations might generate at a specific historical juncture. For example, procedural difficulties in fixing the value of a rent in various tenancy contracts such as sharecropping and the *marṣad,* all of which are the outcome of limitations inherent in Ḥanafī dogma itself, led to procedural fictions to absorb the need of such contracts that were not traditionally recognized in classical Ḥanafism. Once we accept the procedural nature of legal fictions, their detection in the sharī'a courts and other legal texts becomes a question of expertise and time (see Table 2-2 *infra*).

31. Carlo Ginzburg, *À distance: Neuf essais sur le point de vue en histoire,* translated by Pierre-Antoine Fabre (Paris: Gallimard, 2001), 46, argues that juridical *fictiones,* already very much known to the Romans, consist in making operational, in a precise situation, an inexistent reality. It was only in early modern Europe that a "control" of fiction began to take shape by forcing through the "reality" test: "Le patrimoine technologique qui a donné aux Européens de conquérir le monde comportait aussi une capacité renforcée au cours des siècles de contrôler la situation entre visible et invisible, entre réalité et fiction" (49).

32. Alan Watson, *Roman Law and Comparative Law* (Athens, Georgia: University of Georgia Press, 1991), 263: "In both Roman and English law use was made of fictions. For Rome the classic account is again to be found in Gaius's *Institutes.* He describes some instances of fictions being used in formulary actions. For example, the praetor had greatly changed the old civil law of succession, and hence a praetorian action ought to be given to someone who was not the civil law heir as if he were the heir, either to claim the inheritance or to claim a debt owed to the inheritance... The Roman fictions have in common that they are extending an existing right to a new class of persons or new class of situations. There is no pretense about

Roman and English.[32] Modern systems tend to expand the possibilities of judicial practices with more explicit formulations or codes, while leaving more room to social actors to create their own contractual settlements; the courts, in turn, tend "to fill the gaps" rather than impose rigid norms beforehand (for example, the notion of "the freedom of contract").

For our purposes here, the notion of procedural fiction presents us with a few problems that need to be clarified. First, are procedural fictions identical with what the Ḥanafīs understand by *ḥiyal?* We noted earlier how Ibn ʿĀbidīn vehemently denounced the corruption in the judiciary and how alleged "disputants" come to court with "faked" litigations and the like, only to add that judges who are aware of the faked nature of the alleged litigation should not proceed with a ruling. Such assertions, however, remain vague at best in that they neither provide us with concrete examples as to what a so-called "faked litigation" consisted of, and which ones were the most predominant in the first half of the nineteenth century, nor are we informed whether they did form a genre of their own at the margin of the *ḥiyal;* and assuming they did not, why weren't they then endorsed like many of the legal subterfuges? Second, and what makes Ibn ʿĀbidīn's position even more confusing is his unwillingness to discuss the *ḥiyal* phenomenon thoroughly, so that, again, we remain uncertain as to what constituted a subterfuge in his own time and from his standpoint, and which ones would be considered as fully "legal," meaning that they had already been routinized through the practices of the courts.

A look at the procedural fictions (based on my own definition) listed below in Table 2-2 reveals a set of contractual settlements that were essential for the economic survival not only of the landed aristocracy, but also of a merchant class whose extra cash had to be invested in areas traditionally closed for monetary investment, such as waqfs and state-owned mīrī lands. Considering how widespread such practices were, it would have indeed been unthinkable that they did not receive the endorsement of scholars. As we shall see in the following chapter, Ibn ʿĀbidīn did acknowledge such "illegitimate" practices as the *khulū* and *marṣad* (an investment by the tenant in the waqf's property) as a necessity created by the unusual economic conditions of the times, but he stopped short of their integration within the norms of the fiqh.

From my standpoint, as the cases in question show, identifying procedural fictions with the subterfuges common to fiqh manuals and the responsa poses

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them." Since sharīʿa law looked upon all Muslims as fundamentally equal, there was no need to create fictions to expand the law to other groups. As we will see with Maronites like the Shihābs (Chapters 5 & 6 *infra*), they came to the Ḥanafī courts of Beirut precisely to have Islamic law applied to their contractual settlements, as a non-Muslim was not obliged to know any other legal order in particular when it came to pecuniary transactions. Fictions were therefore helpful to expand the range of contractual settlements for the élite groups in society, whether Muslims or non-Muslims.

the problem of their origin: Did they originate, as they most probably did, in exchanges between judges and muftīs, or should we rather look at the doctrinal level for an explanation? Thus, even though it is possible to determine in few limited cases (C 6-1 & 6-2 *infra*) the origin of such techniques (for example, a fifteenth-century responsum transmitted to later generations, prior to being picked up by the Ottoman courts), I was unable to pin down any *explicit* endorsement in the Ottoman Ḥanafī literature. This indicates the informal nature of such practices despite their routinization, so that they were meant, in the first place, to give more room to contractual settlements not officially endorsed by the law, without, however, touching upon substantive issues. We come here to the essence of procedural fictions: whenever the legal order failed to provide a particular type-contract, fiction came to the rescue. I emphasize *procedural,* and, as such, fictions were not meant—and, indeed, did not—modify the substance of the law. But they were not meant either as tricks and bolts to play games against the Ottoman authorities for the purpose of guaranteeing property rights and the like. In the "communal law" that was Ḥanafī practice to the imperial center, such fictions must have been widely known and were no secret. Moreover, they were much broader than simply securing "private" property to an individual or family. First, they consisted primarily of contractual settlements, which were so vast as to cover criminal offenses (Chapter 11 *infra*), and, as all contracts, they eventually led to securing specific property rights. Second, they were meant to furnish "evidence" through the fictitious bargaining process between the alleged disputants, which led to a hard-to-revoke ruling. Thirdly, perceiving such fictions solely in terms of "private" property rights, or worse, as some kind of pre-1858 Land Code settlements, leads to serious conceptual errors. To begin with, the contractual settlements in question were complex procedural matters, which for the most part, fell within the narrow range of "status contracts," meaning that they were intended to protect—though not exclusively—the socio-economic interests of an élitist nobility group. By contrast, the movement of land commercialization of the post-1860s was meant to open up the possession of lands to the middle classes, at least to those who could borrow cash and were not limited to in kind transactions. For another, procedural fictions attempted to bypass limitations within the legal order itself—in its inability to provide particular contractual formulas—rather than bypass the Ottoman land system itself. Moreover, as we will see in Chapter 4, the category of "private" was extremely fluid, and acted in parallel to "possession" and "occupation" (*waḍʿ yad*), so that evidence of labor was what determined ownership rather than a property title through a ruling.

In short, I consider fictitious litigations, unless evidence to the contrary, as extending Ḥanafī practice to a new set of contractual situations, ones that

were overall, though not exclusively, advantageous to the leading classes, without, however, touching upon the substance of the law. In other words, and considering that the first half of the nineteenth century was pretty much economically conservative, they were not meant to translate economic pressures that would have extended the old statutory contracts to other classes. That only began to happen with the monetization of the economy and the expansion of trade in the Fertile Crescent in the second half of the nineteenth century.

The culture of judges

An incomplete survey of the biographies of 65 judges, who served for the most part in nineteenth-century Damascus, reveals how much their education was close to the *'ulamā'* in general, to the point that it was indeed indistinguishable from the group as a whole (see Table 2-1 *infra*). In fact, judges shared not only the same education as muftīs and jurists, but even those of ṣūfīs and *adīb*s as well. Typically, a judge was from a known 'ulamā' family, and while some families produced more than one judge throughout the century, it was for the most part a judge per family. There was thus a predictable cultural milieu out of which judges emerged, so that even if in principle the position itself was open to anyone competent enough in the fiqh and adjudicative matters, the selection process was always restricted to an élitist urban milieu and even, in many cases, transmitted from father to son. As for any future *'ālim,* the father would typically be his son's first educator, a process described in the various "biographies" as one where the young boy "is placed under the guardianship of his father [*tara'ra'a fī ḥajri wālidi-hi*]." Such an operation goes hand-in-hand with the reading and reciting of the Qur'ān, knowledge of the belles-lettres, the fiqh and farā'iḍ (rules of inheritance and succession), mathematics, and language and grammar. It was common that the father would recommend his son to other *'ulamā'* who, in turn, would initiate the maturing future *'ālim* into the arts and the fiqh, and in some instances, the young man would join a ṣūfī *ṭarīqa,* and possibly more than one by the time he had fully matured. In fact, at least half of all listed judges had joined in their career one or more *ṭarīqa*s. At some point, such as over the question of *ẓāhir* and *bāṭin,* or the external and inner deeper meaning of things and phenomena, the fiqh did intersect with the ṭuruqs. But the latter were also an unavoidable milieu for social interaction where ascension was not restricted to the nobility. It also taught servility to a master, self-discipline, and labor within the spirit of a congregation, not to mention all the political implications of such an enterprise.

At every stage of the learning process, the young *ʿālim* completed the process through an *ijāza* drafted by his master, be it a ṣūfī, faqīh, man of letters, a reader of the ḥadīth, or a linguist and grammarian. The *ijāza* (pl. *ijāzāt*) was a kind of memorandum/certification the student would receive from his teacher, which, besides denoting the completion of a specific cycle of learning, would also constitute an identification with a master, style, and judgment, all of which created a "path" of maturation for the student. Biographical notices typically list all the *ijāzāt* that a ʿālim had accumulated over the years, all of which were identified to a master's name, but not every form of teaching, however, was necessarily crowned with an *ijāza.* The whole process was therefore very personal in that it involved teaching on a one-to-one basis, thus maturing into a decision by the master that his student was well fit for the task at hand, and to which the student was to be grateful through the reception of an *ijāza.*

Knowing how little judges wrote—it is even uncertain whether they did in fact draft all the rulings they signed and sealed—the assessment of the many accumulated *ijāza*s is crucial for understanding the culture of judges. In fact, not only did judges leave very few treatises on law, not to mention on the enterprise of judging itself, but the genre of personal biography was, for all intents and purposes nonexistent in this domain, so that the *ijāzāt* offers the first inklings of the education and culture of judges, and, hopefully, some insights on judicial decision making.

Even though such an enterprise is beyond our scope, it might be helpful to point to some of the difficulties and limitations that such a task would encounter. For one thing, since the *ijāzāt* are for the most part unpublished and still in a manuscript form,[33] their systematic compilation is no easy task. Moreover, since the majority of judges had an apprenticeship that included several masters in more than one branch of knowledge, a complete examination of all *ijāza*s is worth the effort. In fact, a limitation to the fiqh *ijāza*s might give the wrong impression, while their relationships to one another in different branches of knowledge would be a contribution towards an intellectual biography of judges. In short, the complete intellectual trajectory needs to be reconstructed and assessed, whenever possible, even though its influence on judicial decision making is by and large uncertain.

In effect, what clearly emerges from those biographical notices is the fact that the majority of those individuals were judges only at some point in their career, and, indeed, even if we were not to limit their *legal* career to

33. Steve Tamari who completed in 1998 a doctoral dissertation (Georgetown University) on the 'ulamā' in eighteenth-century Damascus, told me that a great deal of those *ijāzāt* have survived and have recently been relocated from the Ẓāhiriyya to the Asad National Library in Damascus.

judgeship and stretch it to all kinds of legal positions, such as those of scribe or court deputy, judgeship turns out to be one of many things that such men had devoted their lives to—but, and it should be emphasized, becoming a judge did usually fall only towards the end of their careers. In fact, it did happen all too often that those *'ulamā',* as soon as they drafted all their *ijāza*s and completed their cycle of learning, became themselves teachers, then got deeply involved in a ṭarīqa, then joined a circle of learning at the Umayyād mosque, prior to becoming a preacher in the same or one of the other related mosques. When it came to one of those many positions within the domain of the sharī'a courts, there were, to begin with, several of them, and it is not all too clear who did what exactly, and which one was more prestigious and influential. For one thing, since appointing judges was like a personal gift from the sultan, the assumption was they were appointed to be complacent with the ideology of the ruling dynasty, hence they were neither all that competent nor knowledgeable. Indeed, as we already pointed out, a *'ālim* of the stature of Ibn 'Ābidīn did not mince words when it came to judges: they were, very simply, corrupt individuals. Which poses an intriguing question as to who was appointed judge in the first place. In effect, most of those on our list had various positions of *niyāba*s, meaning that they were deputy-of-something: either the deputy of a judge (*nā'ib qaḍā'*), or the deputy of a court (*nā'ib maḥkama*), or simply in a general *niyāba* position. Moreover, even the two positions of scribe (*kātib*) and head of the scribes (*ra'īs al-kuttāb*) were not minor ones since, again, those were occupied by the *'ulamā'*. All this does suggest that (1) all the various scribal positions and the deputies of judges and courts were occupied by the same category of *'ulamā',* which does suggest, at some point at least, a process where decisions were shared among judges, their deputies, and the scribes who helped them in drafting those decisions; (2) the local *tarājim* do undeniably point to a proliferation of *nā'ib*s positions to a point that their correlative *qaḍā'* ones were far less in number; but that's only what the *tarājim* note—local people who achieved some prominence and who belonged to the élitist inner circles of the a'yān, or "outsiders" who had some influence on the city (wālīs, judges, etc.)—so that there's an broad category of individuals who might have been appointed to judgeship positions but were never acknowledged in those closed and self-serving biographies.

A note of caution must be added regarding how our database has been compiled. Two preliminary sources ought to be considered when compiling lists of judges, and their deputies and scribes: (1) the local biographies, and (2) the sharī'a court records. Names of judges might also be occasionally dropped in other sources too, but for our purposes here, the above two sources should be more than enough despite all their deficiencies. For one thing, even though the sharī'a court records should be the most comprehensive source in this respect,

the identification *by full name* of the judges and their deputies is not always as easy as it might first look. In fact, such names were only occasionally provided in full, so that if one was identified as, say, "Shaykh Aḥmad Efendi," it would lead to so many possibilities and guess work that it would only contribute in helping the uncertainty grow. Moreover, since a register would, in most cases, be crowned right from its first page with the judge's and his deputy's full or partial names, and since the eight Damascus courts were always presided over by Ḥanafī judges, the judges from the other madhāhib were named, together with their madhhab (in particular if that is relevant to the case), in each of the cases to which they had contributed. In fact, Ḥanafī judges in order to avoid being accused of "ruling based on an opinion from another school [*ḥukm al-qāḍī bi-ghayr madhhabi-hi*]," had to receive an approval first from a non-Ḥanafī judge prior to ratifying the case all by themselves (see Chapter 3 *infra*). In short, one must go through all the cases on a one-by-one basis rather than be content with what is offered at the shining surface of a register, and come up with a computerized list that would include each possible name in a register. Ideally, then, such a task must be completed for all the registers of a given period. However, having only completed such a task very partially, it is worth noting some of the disappointments. For one, besides the margin of names that are impossible to fully identify, there is another margin of judges and scribes whose names appear unmistakably in full but who have no biographical notices so that it is impossible to know who they were for certain. This margin of the unknown—which could vary from 10 to 20 percent or higher from one register to another—should be looked upon with respect to the other more well known group of *'ulamā'*. In fact, even though some of those unknown came from well established families, or even families that had substantially contributed to judgeship, it is nevertheless difficult to look at the absence of biographical notices for such judges as a necessary indication that they were less knowledgeable than their peers. In addition to those, there was also a broad category of judges who were neither from the élite *'ulamā'* group nor from a well known family; moreover, they seem to have left little impact in the biographers' minds. Finally, a third category of judges must be included to complete our classification: the itinerant judges. Those were for the most part judges who served in more than one city—sometimes close to a dozen, often spread throughout the Empire—with Damascus or Beirut only one stop in their career route. Not all were in fact insiders to the city, even though a surprising number served in Greater Syria. By contrast, the few outsiders whose career included a vast number of cities, look also the most professional in that their entire life was devoted to judging: rather than changing careers, they moved from one city to another with the same purpose in mind. Professionally, they come close to a category that a biographer like

Shaṭṭī[34] simply identifies as "the judge of Damascus [*qāḍī Dimashq*]," and his *A'yān Dimashq* only lists six for the entire nineteenth century.[35] It is yet to be determined what this position was all about: Was it one of pure supervision or did these judges also preside over hearings?

But whatever the category that a judge would fall into—whether from the traditional *'ulamā'* group or not, a member of an influential family or not, an insider or an itinerant outsider, a devoted judge or one to whom judgeship was one among several vocations, not to mention all those totally incognito figures whose names simply pop up in the court registers but are nowhere in the *tarājim*—and all of which did certainly make a difference in their genealogical affiliations and loyalties, it remains certain, however, despite all the lacunae we have encountered, that there was indeed a minimal degree of cohesion in what might be described as "the culture of judges." Such a coherence was, in the final analysis, determined by their educational élitist background, the fact that judgeship was not necessarily their main target as it came through among several stops in their careers, and hence, besides some knowledge in the fiqh and the *farā'iḍ* (rules of inheritance and succession), had no training in court procedures as such. In fact, what brings all such group members together, besides their noble origins, was the *general* character of their education and the lack of a specific legal training in terms of court procedures and the like. Such a lack of focus was definitely an outcome of the broadness of each career and the fact that "knowledge" meant a comprehensive attitude towards life, but, as far as the legal system was concerned, the non-differentiation between law-finding and fact-finding eased the way for *'ālim*s to become judges once certain requirements were met. In fact, since judges were the sole masters of their courtrooms, and rulings were drafted at their own discretion, there was no "third party" that would investigate on its own, collect evidence, and thus act as a buffer zone between the judges, on the one hand, and the disputants, their representatives and witnesses, on the other. Besides the nonexistence of fact-finding as an enterprise that would be construed independently from the sole authority of the judge, witnesses were neither subjected to direct- nor cross-examination, which points to the costs involved in fact accumulation, and that was the norm even in domains such as crime and homicide where facts were crucial (see Chapter 11 *infra*). The point here is that as long as judgeship

34. Shaykh Muḥammad Jamīl al-Shaṭṭī, *A'yān Dimashq fi al-qarn al-thālith 'ashar wa-niṣf al-qarn ar-rābi' 'ashar, min 1201-1350 Hijri* (Damascus: Dār al-Bashā'ir, 1994). Shaṭṭī's *A'yān* is a more complete work than the earlier Biṭār's *Ḥulyat al-bashar.*

35. Each one of the following six is identified by Shaṭṭī as *qāḍī Dimashq:* Aḥmad Mukhtār Khālid Bek, Ḥasan Ḥusnī b. Muḥammad Ismā'īl, Ḥusayn b. Aḥmad, 'Umar Bahjat, Muḥammad Efendi al-Maḥāsinī, and Sa'īd Efendi al-Usṭuwānī.

did not require the kind of special training that would have required from the judge to learn how to integrate the outcome of a third-party investigation, it thus became one of those positions which, *inter alia,* was at the epicenter of a *'ālim*'s career.

The general feeling was that since judges were, as Ibn 'Ābidīn pointed out, an appointment by the sultan which had all kinds of symbolic and discursive components, they were by definition not as knowledgeable as the urban Damascene *'ulamā',* and thus each appointment represented a harsh process of assimilation into a more subtle milieu of scholars. But the ease with which *'ālim*s shifted between the positions of judge, *nā'ib,* and scribe, made judges very much dependent on the expertise of their deputies and scribes. In fact, it does seem that all such positions required roughly a similar degree of competence, and at least an equal knowledge in the fiqh and *farā'iḍ,* so that all outside sultanic appointees definitely benefited from such an expertise and the ease with which positions shifted. It should be emphasized, however, that some *'ulamā'* families, in all their ranks, did exercise a monopoly either over judgeship, or the *niyāba,* or the scribal offices, or possibly a combination of two offices, so that the division of labor and the monopoly that ensued were indeed like those exercised by the craft-guilds and became quasi *ṭā'ifa*s in their own right with accumulated privileges. Thus, even the scribal positions were sometimes inherited from father to son as if the knowledge that they required became proprietary.[36] But the ease with which prominent or less prominent *'ālim*s interchanged positions as if no special skills were required, considerably limited the impact of such monopolies.

It is quite probable that the judges appointed by sultanic decree and who did not leave much of an impact on the *'ulamā'* group were excluded from the major biographical notices, and such a category was indeed not limited to outsiders alone since it is to be expected that some of the insiders shared the same fate. However, some biographical notices of the itinerant judges definitely point to judges with a high degree of expertise, probably of a different nature and of a higher caliber than their Damascene colleagues. For one, the Damascus circle of élites, who kept most of the court positions for themselves, did not seem well versed in the Ottoman qānūn and their savoir-faire was limited for the most part to a transmitted knowledge of the fiqh and *farā'iḍ.* In fact, and even though some of the *'ulamā'* were closely linked to Isṭanbūl and resided in the capital city over long periods of time, or even had a permanent residence and died there, the Turkish link was overall not strong enough to

36. Such was the case, among others, of the family of Khalīl Efendi al-Maḥāsinī whose sons and descendants were like him all enrolled in the courts' scribal positions, or that of Sa'īd Efendi al-Ayyūbī (see Shaṭṭī, *A'yān,* 119, 132).

create a group of knowledgeable experts well versed in the qānūn. As a matter of fact, as the Ibn ʿĀbidīn case shows, the relation between qānūn and sharīʿa was not well thought out and remained quite elusive. In the meantime, firmans kept pouring into the sharīʿa courts and copies were left in the registers, but it remains uncertain as to what purpose that served.[37] In effect, while some of the outside judges might have been intimidated by the knowledge of the urban *ʿulamā',* some itinerant judges probably brought with them the kind of legal expertise that local judges might have lacked. But overall the two worlds of Ḥanafī practice and the qānūn remained separate.

By the early nineteenth century Damascus must have had a total of seven to nine courts, depending on how we identify all the different names that a court was given in the registers, often mixing the name with the neighborhood, which we need not get into here. (By the 1870s, a ninth court, Ṣālḥiyya, located in a mountainous area north-west of the city, begins to emerge in the registers,[38] but its status, however, remains uncertain.)[39] Even though the majority of judges served on average in a couple of the Damascus courts (some had only one court), only three had the privilege of being present in practically all the courts: Shaykh Muḥyī ad-Dīn Efendi al-Idlibī, a Shāfiʿī, was one of them; as to the other two, one was also a Shāfiʿī (Muḥammad Salīm Efendi aṭ-Ṭībī), and the third was Ḥanbalī (Shaykh Muḥammad Efendi al-Birqāwī); and only on one occasion a Ḥanafī from the Usṭuwānī family served in six courts. A very small number of non-Ḥanafī judges, therefore, coordinated between the various courts and acted like chief judges in their own school. As noted earlier, non-Ḥanafī judges, whose full names remained for the most part unidentified, were useful in completing the procedural fictions that Ḥanafī judges badly needed in order to validate some types of unauthorized contracts, and that they would not have been able to complete on their own in conformity with their own school (see Chapter 3 *infra*). Indeed, what specifically characterizes the nineteenth century was the proliferation and routinization of procedural fictions, so that adjudication became more a matter of validating what must have in principle been invalid contracts.[40]

Shaykh Muḥammad Birqāwī, who was born in Damascus in 1220/1805 and died there in 1297/1880, was a prototype of an ambitious *mujtahid* from

37. See Chapter 10 below on sultanic legislation.

38. For example, in register 691 it is noted that Muḥammad Rāghib Efendi Makkī served in the courthouse of Ṣālḥiyya in 1294/1877; Judge Maḥmūd Shafīq Efendi al-Khānī served too in that same courthouse, and also in ʿAwniyya (there were only six registers for Ṣalḥiyya for the years 1873-78).

39. For a description of the Damascus Ottoman archival documents and registers, see Brigitte Marino and Tomoki Okawara, *Catalogue des registres des tribunaux ottomans conservés au centre des archives de Damas* (Damascus: Institut Français de Damas & Centre des Archives de Damas, 1999).

40. See Table 2-2 *infra.*

a minority *madhhab* who had problems getting his opinions appreciated.[41] He was the general qāḍī of the Ḥanbalites and received that position from his father Muṣtafa in 1250/1834. He learned the fiqh first from his father and then from Shaykh Ḥasan Shaṭṭī, and the "sciences" from Shaykh Sa'īd al-Ḥalabī and Shaykh 'Abdul-Raḥmān al-Kuzbarī. He began his career as the head of the scribes (*ra'īs al-kuttāb*) in three different courts: first in Sināniyya, then in Buzūriyya, and finally in 'Awniyya, but the sharī'a courts documents have him present as judge, throughout the 1830s and 1840s and possibly later, in all the Damascus courts with the possible exception of 'Amāra.

Birqāwī was known to have strong opinions on some legal issues such as the *faskh,* that is, the annulment, cancellation, or abrogation of a contract (*naqḍ al-'aqd*), and also on the revocation of a contract; and on the *raj'a,* which is the return of a divorced wife to her husband without the necessity of a new contract. An incident took place in 1259/1843 that was known to the general qāḍī (*al-qāḍī al-'āmm*) and to a group of learned men (*mashāyikh*) in which Birqāwī had decreed legal the annulment (*faskh*) of the marriage contract of a wife whose husband had been away for a long time without her own consent. He then demanded from the Shaykh al-Ḥanābila of the time, Shaykh Ḥasan al-Shaṭṭī, to ratify the *faskh* in question. Shaṭṭī decreed this *faskh* act null and void because it did not meet the required legal conditions. Birqāwī was thus forced to revoke his previous opinion and a qāḍī ruled that the wife should stay with her husband (*tabqa al-zawja bi-'uṣmat zawjihā*). Birqāwī eventually lost his position (*'uzila*) and Shaykh 'Abdul-Ḥafīẓ al-Nābulsī was appointed in his place. Shaṭṭī (grandfather of the biographer) was then asked, after this incident, to draft an epistle (*risāla*) on the issue. Thus came the pamphlet *al-Fawz wal-najāḥ fī ḥukm faskh al-nikāḥ,* "Winning and succeeding in rulings regarding the annulment of marriages," which was published in Damascus in 1328/1910. Ironically, it happened that the husband of the woman in question came back only few days after the incident took place, and was thus happily reunited with his wife (*qabaḍa 'ala zimām zawjatuhu*) and thanked Shaṭṭī for his action.

Another example of a position inherited from father to son, but this time among the dominant Ḥanafites, would be that of Shaykh Aḥmad Ḥalabī. Shaṭṭī refers to him first in conjunction with his father's biography,[42] 'Abdullah Ḥalabī (a faqīh), and notes that the son was also a faqīh who served as court deputy (*niyābat maḥkama*) in al-Bāb, even though Damascus sijill 691 associates him with al-Qassām. He then became administrator (*nāẓir*) of the Umayyād mosque until his death in 1303/1885. His two sons were also *'ālim*s:

41. Shaṭṭī, *A'yān,* 237-8.

42. Shaṭṭī, *A'yān,* 189-192.

Shaykh Riḍā Efendi was like his father court-deputy in al-Bāb, then muftī of Damascus until his death in 1330/1911; the second son, Muḥammad Efendi, was administrator (mutawallī) of the Umayyād mosque. Their children were also prominent individuals of the same sort (*ma'rūfūn*).

Further details are provided in Shaṭṭī in a separate biographical notice.[43] Ḥalabī was educated under the care of both Shaykh Muḥammad Jūkhadār and Shaykh Muḥammad Sukkarī. Upon his father's death, he began teaching at the Umayyād mosque, in its northern section where his father and grandfather once taught, then became an *amīn fatwā* (assistant muftī), and then court deputy (*niyābat al-maḥkama al-shar'iyya*), prior to becoming administrator of the Umayyād in 1288/1871. He in fact had replaced the young (and immature?) Ismā'īl Efendi Ghazzī. The appointment was beneficial to the mosque as he was a likable character to whom people came in conflicting situations. He was then appointed in several councils: *al-jam'iyya al-khayriyya* in 1298/1880, and the council of awqāf in 1302/1884, while persevering on his teaching position. He died from an illness when performing the Ḥajj in Mecca in 1303/1885.

Such biographical notices are typical in what they reveal, namely the flexibility of all the positions that the *'ulamā'* shared and inherited, and the ease with which they moved from one position to another: teaching and administration were among the most common, and so were all the *niyāba* and *iftā'* positions, so that the enterprise of judging, or the *niyāba*s for that matter, were coexistent with each other . In effect, they were not even necessarily the highest point in a career since they could just come at a moment when the candidate was too young or too old, even though for many, retirement did indeed coincide with the end of their legal career. What obviously made the difference was the sociological background of the candidate, and in particular the social position of the father and his family since that was a milieu that preserved itself from all kinds of intrusions, including the Turkish bureaucratic authorities; its *raison d'être* was precisely to pursue the reproduction of that élitist group. It should be emphasized, however, that the reproduction of such a closely knit group would not have been possible were it not for the common stock of knowledge that they shared and that enabled them to move from one position to another with ease. In fact, all such positions—teaching, preaching, ṣūfism, sharī'a courts, administration, and the like—were not looked upon as professional activities that needed specialized training. More precisely, in judicial affairs, the activities of lawmaking, lawfinding, and fact-finding, did not differentiate into separate activities that would have required a different training and expertise than what was required in the traditional *'ulamā'* education. The fact that the judge was held responsible for all three combined

43. Shaṭṭī, *A'yān,* 315.

made him the master of his own courtroom with no intermediary third-party expertise needed. As a matter of fact, when the first and then second wave of reforms came through, those same individuals moved swiftly, and with no apparent difficulties, into the newly created majālis and the *niẓāmiyya* and *isti'nāf* courts as well.[44]

44. It is known that the Ottoman administration began its judicial reforms in the 1850s with a promulgation of a series of new modern codes, most notably the Land and Penal Codes, both of which were completed in 1858. But at that time, only the majālis of the Tanẓīmāt adjudicated parallel to the sharī'a courts: in other words, there were no newly designed courts that would act upon the new laws and regulations, and the *maḥākim al-isti'nāf al-niẓāmiyya,* as they were called, apparently did not begin their work, as far as Damascus is concerned, prior to 1882. In fact, 142 *niẓāmiyya* registers have survived from the 1882-1916 period, in addition to 100 other registers labeled as *derkanār,* and which were probably miscellaneous entries to a varieties of cases and issues that did not fit within one particular court. (The so-called commercial courts also happened to have begun by 1883.) The major cities in Greater Syria were therefore left for a period of at least two decades (the late 1850s to the early 1880s) with all kinds of judiciary powers that in principle were competent enough to handle the newly promulgated laws in conjunction with Ḥanafī practice. But, while the sharī'a court records point to great restrictions on their activities in the 1860s and later (in terms of the reduced number of land cases, crimes, and contractual settlements in general), not enough material has been saved from the minutes of the regional councils to properly assess their work. In short, for the 1860-1880 transitional period, and with the sharī'a courts mostly reduced to personal status matters, little is known about the implementation of the new laws, which for the most part were of Napoleonic origin, and how the old managed to coexist with the new, or how "modern" was the practice of the new codes. In fact, the promulgation of new codes, in particular when their logic owes so much to the French legal system, does not necessarily imply that such a logic was well "absorbed" in judicial decision making. If we look upon legal systems as sets of normative rules (which could be systematic or arbitrary, rational or irrational, logical or religious and oracular), it is then their assimilation within a culture that really matters.

The *niẓāmī* courts registers, mostly drafted in Turkish, could provide such an opportunity. In fact, they fit perfectly well within a period of rapid judicial change imposed by new laws, regulations, and institutions. The codes themselves are nothing but a set of objective normative rules imposed by the state to enhance the process of bureaucratization and centralization fostered by the reforms. Not only were such rules not the product of Ottoman societies, but it is the process of their internalization as normative values by the social actors that carried them that is worth an historical investigation. Even though such a task is beyond the scope of the present work, it is nevertheless worth outlining the importance of such a research, at least in conjunction with the main arguments proposed in this study. The ambitious effort deployed by the Ottoman administration to modernize its legal system aimed primarily at bureaucratizing and centralizing a vast array of judicial practices that were left for the most part at the mercy of local powers, status groups, the sharī'a courts, and the regional councils. It is as if the old system, which is the subject of the present work, was a compendium of "special laws," all of which did fit well with the practices of a group but did poorly in conjunction with one another. In fact, what clearly emerges from our study of adjudicative practices is a hunger for new contractual settlements that would place the parties concerned in a well defined relationship to one another, at least one that would not have required all the procedures involved in fictitious litigations. Indeed, it was the failure of the judiciary to provide the particular type-contract that pushed the courts towards awkward forms of decision making regarding property transfers, criminal settlements, and the like.

The diwan of the qadi and his sijills

The conundrum, thus far unanswered, regarding the unavailability of the qāḍī's sijills—an equivocal term as we shall see—for periods earlier than the Ottoman has thus far been left unanswered, and was only tackled recently, very persuasively, by Wael Hallaq.[45] Besides showing that the practice of keeping "court" records—as *dīwān*s rather than *sijill*s—goes back to early Islamic times, Hallaq argues that nothing distinguishes the Ottoman period from its predecessors except that its registers have survived, while the non-survival of previous registers is accounted for in terms of their "loose" nature—a large number of unbound leaves—and the fact that they attracted little attention, if any, from jurists, scholars, or historians. What should be of concern to us, however, are, first, some basic issues of terminology, and then, second, the practice of keeping up court records, and the fact that they constituted mostly the "memory" of judges, and were kept and transmitted from one judge to his successor solely for that purpose, raises important issues as to the relevance of those documents for legal doctrine, precedent, and case reporting.

To begin with, even though there were no formal requirements in the pre- and Ottoman fiqh literature that the qāḍī formally meets with his clients in a "courthouse" (or "courtroom") or anything similar, and that the literature refers to the space of adjudication mostly as *majlis al-ḥukm,* I feel justified using "court" simply because, for Damascus in particular, the hearing sessions took part in well known "courts" (at least eight by the nineteenth century), located in various parts of the city, and which each document usually identifies. The document would thus typically refer to the "session" or the "space" of encounter as *majlis mawlānā al-qāḍī,* and then to the "location" as the *maḥkama,* followed by the neighborhood's name (or Kubrā for the main court—one should say courtroom rather than courthouse, considering the simple nature of those places and their existence within compounds other than their own). But it ought to be stressed, however, that such "courts" were neither part of a "centralized" system, nor equipped with any bureaucracy for that matter. The fact that the Ottomans kept the court system, as all their predecessors did, without any attempt to centralize it through a common norm—or by bureaucratizing it, as they did in the second half of the nineteenth century with the niẓāmī courts—are further indications that the qāḍī-oriented courts, dominated as they were by his personality, were spaces of "private" decision making, while "public" matters, such as problems related to the iltizām, had

45. Wael B. Hallaq, "The *qāḍī*'s *dīwān* (*sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies* 61, no. 3 (1998): 415-36.

a parallel system of judicial *policy* making through the regional councils and the like. In fact, Ottoman interference in the affairs of the sharī'a courts (as historians commonly refer to them) did not go beyond attempts to impose judges, a practice, which, as our list of judges (Table 2-1 *infra*) shows, clearly declined throughout the nineteenth century, thus never imposing anything worth noting on the procedures of those courts or on judicial decision making. In short, Ottoman interference at its best attempted to create a system in its favor through *personal* appointments.

More seriously, however, is the notion of *sijill,* which, as Hallaq argues, should be more properly designated as *dīwān* since it indicates the totality of the records kept by the judge. To my knowledge, however, the Ottoman records have been preserved and received as such by the courts of the French Mandate as "bound" volumes. In fact, it does seem that judges and scribes wrote down their "cases" in bound volumes rather than on loose sheafs—or at least the information that was "relevant" to all parties, and which served as the judge's memory and was probably transmitted to the parties on separate *ḥujja*s signed and sealed by the judge or his deputy. But the copy that the judge kept for himself, and which he transmitted to his successor, was drafted within the bound volume that he kept for most if not all of his cases. In fact, even though we do not possess any reliable descriptions as to how judges worked, it does seem, however, that judges must have typically kept a set of two active registers, one for the regular cases—mostly of contractual nature, land litigations, marriage and divorce, and occasionally, criminal settlements—and another for successions; but it is also possible that some judges did only successions. As their respective dates clearly point out, cases were usually (though not always) drafted one after the other, probably from fresh memory as soon as the hearing was over, and were inscribed so as not to leave any empty space at all—probably as a safety measure so that nothing is added to the "original." (Marginal notes, *ḥawāshī,* were always added in such a way to make them visible as additions, and were authenticated by the scribe's signature.) The point here is that, unlike the pre-Ottoman practices that Hallaq describes, the Ottoman sharī'a courts (as they came to be called—but by whom?) adopted—probably a few decades after the conquest of Greater Syria—this practice of bound registers (but probably not all registers) without the hard bindings in which we find them today, and which for the most part were added in the 1970s and later for a safer access by contemporary researchers. Thus, for example, the thirty or so volumes that have survived from the Beirut courts between the early 1840s and the 1860s (for unknown reasons no earlier registers have been preserved), all came originally bound (or so was I told by the actual authorities of the Sunnī courts), and their current binding—in pretty bad shape—has not been modified. If my assumptions prove to be correct, then the bound-volume

practice has definitely helped in the conservation of the heritage of the Ottoman sharī'a courts—a mini technical innovation of some sort, but of tremendous consequence. Obviously, the fact that even as late a jurist as Ibn 'Ābidīn fails to mention that change from the unbound to the bound registers does not seem to work in our favor, but we have seen, and there is more yet to see, how both his general discourse lagged behind at times, and that the historicity of the fiqh enterprise is a serious issue that needs full reconsideration.

The practice of conserving the labor of judges, their deputies, and scribes in *sijill*s, if accurately portrayed, then legitimizes the use of *sijill* rather than *dīwān* for the qāḍī's paperwork in Ottoman times. It should be noted, however, that such a practice must have come several decades after Ottoman rule began, hence the availability of only a single sixteenth-century register for Damascus, while the seventeenth-century collection is almost without fault. Of course, those registers only show the *outcome* of a judge's work, while his personal papers and thoughts, early drafts, or even the possibility of verbatim notes from the hearings, were not part of the registers, and thus may have been permanently lost. In some cases, the idea of jotting down in those registers "what needs to be memorialized for future reference" also meant preserving copies of some or all of the sultanic ordinances (*awāmir,* firmans, *dustūr*s, edicts, etc.) that emanated directly from Istanbul.[46] What is striking, considering the importance of those edicts and their totally alien nature from the courts' hearings, is that no special registers were devoted to them, but that could have been the outcome of two factors. One was the rarity of those firmans—at best, once a month—and the other was their non-integration within the space of the courts, meaning that they had no proper place in the decision-making process. The only reason for their inclusion could simply be that judges had to be aware of a form of legislation that could interfere at times with their own work.

The majālis of the Tanẓīmāt and their record-keeping practices pose another riddle that ought to concern us only in conjunction with the ones we have outlined for the courts. The problem here is the extreme rarity of available registers which I will discuss later,[47] but suffice it to note that whatever was miraculously found turned out bound in a way almost identical to the sharī'a courts, even though those registers tend to be even more alert as to the dates of their successive sessions, considering that even their days off were carefully recorded. The non-survival of a large number of those registers, however, might be due to the fact that, unlike the courts, they neither had regular meeting places

46. See *infra* Chapter 10.

47. See *infra* Chapter 9.

nor a standard storage space. It is even doubtful, considering that they were presided over by boards of twelve notables who acted as legal honoratiores, that there was a process of *tasallum wa-taslīm* of the drafted materials from one majlis to another. The likelihood is that those sijills remained in private hands and were gradually lost because they had no single storage facility.

Assuming we were able to solve the riddle of the high turnout of the Ottoman court registers, the problem framed by Hallaq for what seems to be a permanent loss of the pre-Ottoman registers is worth a reconsideration. In fact, that loss could be mostly associated with the fact that the qāḍī's dīwān, as it was called, served no other purpose than of recording and solving disputes and other contractual obligations. In other words, it did not serve as a quasi-"literature" that would have connected with other discursive formations, beginning, of course, with the fiqh itself, even though some of the *maṭālib* ("requests") of the *shurūḥ* manuals look like responsa that must have emanated either from real or potential cases. In fact, the court records, either in their pre-Ottoman *dīwān* form or the Ottoman *sijill*s themselves—they must have been renamed *sijill*s ("registers") due to their bound nature—did not arouse the curiosity of scholars and jurists, and thus were kept as the "memory" of the judges who drafted them. Thus, unlike the fatāwā, which were subject to compilation and commentary from scholars and disciples, and at times printed and made public, the court records had no such function within the juristic literature. Even the *shurūḥ* manuals, such as Ibn 'Ābidīn's *Radd,* incorporated a great deal of the fatāwā in the forms of "requests" (*maṭlab, mas'ala*), but very seldom did they refer to the actual work of the courts, while their procedural matters discussed under the rubric of *adab al-qāḍī,* look abstract and arcane compared to the effective work of the courts. The point here is that scholars—with a strange parallel to contemporary historians who find no interest in the legal reasoning that frames the decision-making process—found no real benefit in incorporating "real cases" into their own findings. The underlying discourse here is that courts "apply the law," and hence have nothing new to give to the legal literature.

Nor was the sharī'a court system "centralized" in any way so as to push those "central authorities" towards a scrutinizing of the courts' proceedings. In effect, the sharī'a system developed, under the Mamlūks, on a regional basis through an assimilation of local customs, and was thus closer to a "private" system of adjudication than a "national," state-oriented one, even though Ḥanafism was state approved. Bureaucracy was practically nonexistent and limited to the judge, his deputy, and scribe. More importantly, the system was not effectively "centralized" even within the boundaries of the city, so that it was left to the discretion of each judge in each court to decide. But it would be misleading, however, to interpret such a relaxation of "judicial review," lack

of centralization and bureaucratization, in terms of an unpredictable system left to the mercy of judges. As many of the cases in this study plainly show, practically every outcome of each case met the expectations of the disputants. The smallness of the milieu, the nature of the education of judges and their connections to other ṣūfī, literary, and *'ulamā'* networks, were all factors that made them all tied to and familiar with one another. Moreover, when judges felt uncertain about the outcome of a case, they sought for a fatwā (C 7-2 & 8-2); and it is certain that the (more or less systematic) compilation of fatāwā, the process of updating them (*tanqīḥ*), and the position of iftā' itself, all contributed to a rudimentary cohesion of the system within urban areas. In fact, such networks extended from one city to another, even in terms of appointments of judges and muftīs, or of networks of consultation and transfer of knowledge.

The dichotomy of centralization and decentralization is highly inappropriate within the context of the Ottoman Empire. For one thing, those are terms derived from western history and fit best within the context of the European nation-states, as they assume a common norm imposed throughout a given national territory. Such a terminology, however, proves unfortunate in the case of the Ottoman Empire as empires in general do not integrate their multi-ethnic populations by imposing common societal norms, but through a complex process where the autonomy of the diverse populations was preserved and cities left to their own communities' leaders, communal laws, and urban networks. Those cities, however, had a hard time integrating along lines that would have given them a bourgeois community of notables, lawyers, merchants, and landowners. Instead, cities remained handicapped by the fiscal impositions of the state, which first began as military feudal assignments in the surrounding countrysides, and by the existence of some of those assignees within urban areas, some, indeed, among the local notables, while others gradually settled within the urban boundaries and managed to establish networks with the local groups of notables, and even become part of those groups. Such a formula manifests itself at the level of legal institutions too. In effect, Ḥanafism was, for all intents and purposes, a kind of "special communal law" recognized as such by the state, and it is that kind of *recognition* by an imperial bureaucracy that frames the dynamics of such legal systems, and which makes them so different from more primitive systems based mostly on customary practices.[48]

48. The practices of the sharī'a courts are often described as case law, and hence unfairly compared to the better known Anglo-Saxon case law compendiums. In fact, much unjustified focus has been placed on

the judge's discretion, and the fact that neither the Islamic nor the common law systems have systematic codes, hence both supposedly represent systems in the making through court rulings and precedent (or an implicit and never declared "precedent" in Islamicate courts). Such views, however, tend to marginalize all efforts that were deployed to homogenize and rationalize the English common law (and much later the American nineteenth-century system), which point to all kinds of societal differences with Islamic societies in particular regarding the role of institutionalized hierarchies which protect individuals from personal and state abuses. Thus, little attention has been given to what the old English common law referred to as "case reporting," an early example of artificial memory that tracked cases by keeping them listed in notebooks, and its implications. The English (Norman) courts kept no written record until late in the twelfth century, the same period that saw the rise of jury trials, with jurors serving as both fact finders and witnesses. That same period saw the rise of the royal courts that brought about the "common" law—common to all of England—administered from Westminster Hall in London. The common law rapidly gained ascendancy over most local courts as the king's justices traveled in "eyres" throughout England. It was only late in the twelfth century, however, that royal courts began to keep records of their adjudications in "plea rolls," and also written dockets of their calendars and written rules of procedures embodied in "paper books." At about the same time, by 1187, the first known English treatise on law, attributed to Glanville, was written.

The public had no access to the plea rolls. They were kept as internal records of the courts. The only early use of the plea rolls, for publication occurred in the middle of the thirteenth century, when the second major treatise on English law was written by a judge, Henry de Bratton, known as Bracton. As a judge, Bracton had access to the plea rolls, and he used them to compile a personal *Note Book* of two thousand cases, citing about five hundred of them in his treatise.

The principal purpose of the "plea rolls" was to establish what had been adjudicated, so that the decision might be final: what later lawyers would call estoppel by judgment or *res judicata.* Like present day minutes of meetings, they recorded the outcome of proceedings rather than the discussions and reasons which explain how the result was arrived at.

The little attention that legal scholars have historically manifested towards "cases" of the sharī'a courts (and hence no treatises were written based on any of those records) stems from the fact that there was no attempt, even through the long Ottoman history, either to homogenize or rationalize the court's activities from an imperial center. Indeed, that would have been a costly enterprise, one that would not have proven beneficial unless a particular dynamism of the merchant, financial, or mercantile groups manifested itself at some juncture.

England thus saw, since the twelfth century, and in conjunction with a premature proto-capitalism, an early and systematic process of a "national" legal culture, which was highly centralized and administered from Westminster Hall, and also through the itinerant "eyres," which helped to assimilate local customs into the common law. That process was thus very prematurely different from the legal cultures on the Continent, mostly based on amalgams of codes from Roman law and local customs. By contrast the English system became the first modern rationalized "legal order" in Europe despite the fact that it was not structured on a systematic sets of codes. Thus, what became known as the "English exception," referring to the fact that England had seen the development of a full-fledged capitalism despite its non-systematic codes, is besides the point: English common law was very effective in both the creation of a national culture and in the centralization and rationalization of the judicial decision-making process. It was indeed the combination of all those elements that eventually led to the routinization and predictability of the system, all of which contributed in the formation of an aggressive capitalism. See George S. Grossman, *Legal Research. Historical Foundations of the Electronic Age* (Oxford: Oxford University Press, 1994), Chapter 1.

Table 2-1
Judges and deputy-judges in nineteenth-century Damascus♣

			Damascus main courts♦							
Judge♥	**Madhhab**♠	**Died**†	**Bāb**	**ʻAouniyye**	**Kubra**	**Qassām**	**Sannāniyya**	**Mīdān**	**Buzūriyya**	**ʻAmāra**
ʻĀbidīn, Shaykh ʻAlāʼ al-Dīn(*)[49]	Ḥanafī	1306/1888	x			x				
Abū al-Dhahab, Shaykh Muṣṭafa(*)[50]		1317/1899		x	x		x		x	
Adīb, Muḥammad Efendi		served ca. 1290/ 1873						x		
ʻAṭṭār, Shaykh Rashīd (al-)(*)	Shāfiʻī	ʻAjlūn, 1315/1897								
ʻAzīz, Maḥmūd Efendi		served ca. 1290/ 1873	x			x		x	x	
Bazirbashe Zadah, Muḥammad Saʻīd Efendi		served ca. 1291/ 1874		x						
Birqāwī, al-Shaykh Muḥammad (al-)(*)[51]	Ḥanbalī	12 ṣafar 1297/ January 25, 1880	x	x	x	x	x	x	x	

Table 2-1 : 1/7

♣ Sources: The Damascus sharīʻa courts since 1800/1 up to the 1860s, and Muḥammad Jamīl al-Shaṭṭī, *Aʻyān Dimashq*.

♦ These were the main Damascus courts where most cases were heard. There are a few indications that other courts might have been added, in the second half of the nineteenth century, in neighborhoods such as Mīdān, which have grown considerably.

♥ Judges marked by an asterisk (*) have a biographical notice (*tarjama*) in one of the ʻulamāʼ compendiums, usually in Shaṭṭī. Thus, of the 65 listed, 38 had a review of some kind, either one on their own, or else through another biographical notice.

♠ Since the Ḥanafīs were the dominant group, biographers tended to be dismissive of the madhhab, except when it was extremely relevant, e.g., the Ghazzīs who were Shāfiʻīs, or the Shaṭṭīs who were Ḥanbalīs. I've indicated the madhhab only when it was specifically stated as such in the biographical notice. Of course, one could easily infer the affiliation from other family members (e.g., the Usṭuwānīs).

† Since the majority lived and died in Damascus, biographers tended to be dismissive of location. For those whose death remains unknown, I have indicated an approximate year(s) of service based on the court record(s) in which they were named.

49. Son of Ibn ʻĀbidīn, author of the *Radd.*

50. Occupied the position of judgeship of Damascene pilgrimage (*qaḍāʼ al-ḥajj al-shāmī*), prior to becoming a judge in Damascus. In all likelihood, he was a Ḥanafī.

51. General judge of the Ḥanbalīs, hence his serving in seven courts.

			Damascus main courts♦							
Judge♥	Madhhab♠	Died†	Bāb	‘Aouniyye	Kubra	Qassām	Sannāniyya	Mīdān	Buzūriyya	‘Amāra
Dardarī, ‘Abdul-Razzāq Efendi (al-)(*)	Ḥanafī	1338/1919								
Dardarī, Muḥammad Rāghib Efendi (ad-)(*)	Ḥanafī	1320/1902		x						
Ghazzī, Ḥusayn Efendi(*)	Shāfi‘ī	Damascus, 16 Dhul-Ḥijja 1322/21 February 1905					x	x	x	x
Ghazzī, Ismā‘īl Efendi(*)	Shāfi‘ī	1326/1908								
Ghazzī, Muḥammad Abū Su‘ūd Efendi(*)[52]	Shāfi‘ī	25 Dhul-Ḥijja 1291/2 February 1905		x	x					
Ghazzī, Muṣṭafa Efendi	Shāfi‘ī							x		
Ghazzī, Ṣaleḥ Efendi(*)	Shāfi‘ī	1326/1908								
Ḥalabī, Muḥammad Efendi(*)	Ḥanafī									
Ḥalabī, Riḍā Shaykh(*)[53]	Ḥanafī	1329/1911	x							
Ḥalabī, Shaykh Aḥmad (al-)(*)[54]	Ḥanafī	1304/1886	x			x				
Ḥamza, As‘ad Efendi(*)	Ḥanafī	1307/1889								
Ḥamza, Maḥmūd Efendi(*)[55]	Ḥanafī	1305/1887	x				x		x	
Ḥamza, Shākir Efendi(*)	Ḥanafī	1328/1910			x	x				

Table 2-1 : 2/7

52. Took the function of iftā’ from his father, then became a majlis member.

53. Deputy-judge prior to becoming muftī.

54. Appointed as administrator of the Umayyād mosque in 1288/1871.

55. General muftī of Damascus in 1284/1867.

			Damascus main courts♦							
Judge♥	Madhhab♠	Died†	Bāb	ʻAouniyye	Kubra	Qassām	Sannāniyya	Mīdān	Buzūriyya	ʻAmāra
Ḥamzāwī, ʻAbdullah Efendi									x	
Ḥaqqī, Ismāʻīl Efendi					x				x	
Ḥusaynī, Muḥammad Salīm Efendi Qalaʻī				x						
Husaynī, Muḥammad ʻAbdul-Nāfiʻ Efendī										
Idlibī, Shaykh Muḥyī al-Dīn (al-)(*)	Shāfiʻī	Damascus, 18 Muḥarram 1278/ 26 July 1861	x	x	x	x	x	x	x	
Jalabī, Aḥmad Efendi			x			x				
Jūkhadār, Shaykh Muḥammad(*)	Ḥanafī	5 Shawwāl 1297/ 10 September 1880	x		x	x		x		
Kīlānī, Muḥammad Efendi(*)	Ḥanafī	Damascus, 1244/ 1828						x		
Khānī, Maḥmūd Shafīq Efendi				x						
Kuzbarī, Muḥammad Efendi										
Luṭfī, Muḥammad Saʻd al-Dīn Efendi				x			x			
Maḥāsinī, Muḥammad Saʻīd Efendi(*)[56]	Ḥanafī	1343/1924								
Makkī, Aḥmad Efendi								x		
Makkī, Muḥammad Efendi al-Sharīf (al-)(*)	Ḥanafī	Damascus, 15 Jumāda I 1278, 18 November 1861	x		x					

Table 2-1 : 3/7

56. Head of the scribes (*raʼīs kuttāb*), and then a Damascus judge.

			Damascus main courts♦							
Judge♥	Madhhab♠	Died†	Bāb	‘Aouniyye	Kubra	Qassām	Sannāniyya	Mīdān	Buzūriyya	‘Amāra
Makkī, Muḥammad Rāghib Efendi		served ca. 1294/ 1877								
Mūṣalī, Ḥasan Ḥusnī Efendi (al-)(*)[57]	Ḥanafī	Istanbul, 1316/ 1898								
Mukhtār Bek, Aḥmad(*)		10 Muḥarram 1305/28 September 1887								
Murtaḍa, Darwīsh Efendi(*)		1335/1916								
Nābulsī, Amīn Efendi(*)	Ḥanafī	13161898								
Nābulsī, Maḥmūd Efendi(*)	Ḥanafī									
Nābulsī, Shaykh ‘Abdul-Ḥāfiẓ (al-)(*)	Ḥanbalī									
Nābulsī, Shaykh Muḥammad Rashīd(*)	Ḥanafī	Damascus, Rabī‘ II 1316/1898			x			x	x	
Naḥlāwī, Shaykh Salīm aṭ-Ṭībī(*)[58]	Shāfi‘ī	1300/1882	x	x	x	x	x	x	x	x
Najātī, ‘Umar Efendi				x	x				x	
Qala‘ī, Shaykh Aḥmad(*)	Ḥanafī				x		x		x	
Qaysī, Muḥammad Ṣaleh Efendi (al-)								x		
Riḍā, ‘Alī Efendi		served ca. 1294/ 1877		x						x
Rifā‘ī, Abdullah Efendi				x						

Table 2-1 : 4/7

57. General Damascus judge (*qāḍī ‘āmm*).

58. Deputy-muftī (*amīn fatwā*) of the Shāfi‘īs.

			Damascus main courts♦							
Judge♥	Madhhab♠	Died†	Bāb	ʻAouniyye	Kubra	Qassām	Sannāniyya	Mīdān	Buzūriyya	ʻAmāra
Ṣalāḥī, Muḥammad Anīs Efendi				x						
Shāfiʻī, ʻAbdullah Efendi	Shāfiʻī									
Shākir, Muḥammad Efendi		served ca. 1290/ 1873								x
Shafīq, Muḥammad Efendi		served ca. 1294/ 1877								x
Shaṭṭī, Muḥammad Jamīl(*)[59]	Ḥanbalī									
Shaṭṭī, Shaykh Aḥmad (al-)(*)[60]	Ḥanbalī	12 ṣafar 1316/2 July, 1898								x
Shaṭṭī, Shaykh Muḥammad(*)	Ḥanbalī	Damascus, 1307/ 1889								
Suyūṭī, Tawfīq Efendi(*)	Ḥanbalī	served ca. 1339/ 1920								
Ṭaylūnī, ʻAbdallah Efendi			x							
ʻUmar Bahjat Efendi(*)[61]		Istanbul, 1310/ 1892								
ʻUmarī, Muḥammad Rashīd Efendi Kīlānī				x						
ʻUmarī, Muḥammad Ṣādiq Efendi					x					
Usṭuwānī, Asʻad Efendi(*)	Ḥanafī	1329/1911								
Usṭuwānī, Muḥammad Abū-l-Khayr Efendi	Ḥanafī					x	x			

Table 2-1 : 5/7

59. General judge of the Ḥanbalīs until 1349/1930.

60. Muftī of the Ḥanbalīs.

61. Itinerant judge, served in many of the cities in the empire, b. Aleppo 1246/1830.

			Damascus main courts♦							
Judge♥	Madhhab♠	Died†	Bāb	ʻAouniyye	Kubra	Qassām	Sannāniyya	Mīdān	Buzūriyya	ʻAmāra
Usṭuwānī, Muḥammad Amīn Efendi(*)	Ḥanafī	1305/1887								
Usṭuwānī, Muḥammad Rāghib Efendi	Ḥanafī				x	x	x	x	x	x
Usṭuwānī, Saʻīd Efendi(*)[62]	Ḥanafī	1305/1887	x							

Table 2-1 : 6/7

Commentary: The above list of nineteenth-century Damascus judges was compiled from a combination of sources, but essentially two major ones: the biographies of the *aʻyān,* mostly Shaṭṭī, and the sharīʻa court records which always identify the judge and deputy-judge handling a particular case. But our list, however, which comprises a total of 65 judges and deputy-judges is by no means complete, as a more thorough and computerized database that would have gone through every available register from Damascus would have probably reached the total number of 100 for the last Ottoman century. One has to assume, from the much larger number of cases and registers throughout the nineteenth century, that the overall number of judges must have been at least twice that of the previous century.

However, the list is rich and representative enough so as to allow a few preliminary generalizations. First, out of the 65 listed judges, only 38 had a full biographical notice (*tarjama*) in Shaṭṭī—that's 60 percent of the total—all of them indicated by an asterisk (*). Again, here, a more thorough and complete biographical investigation might have led to a slightly higher number—unless, of course, the court registers would have brought even more unrecognizable names—but, for our purposes here, those number already indicate a trend. In fact, there were a number of judges and deputy-judges who were only named in the registers but which the biographies avoided, and the possibility here is that those people were not known enough so as to be listed in the prestigious biographies of the *'ulamā'.* That might be an indication that some of the judges and their deputies either did not come from the tight circle of the *'ulamā',* or else did not make a strong enough impact so as to deserve a note for posterity. Some of those "incognito" personalities came from well-established families which had a long history of contributions to the *qaḍā'* institution, such as Muṣtafa Efendi Ghazzī and Muḥammad Rāghib Efendi Usṭuwānī, both of whom had several family members serving either as judges or deputies, so that the family rank,

62. Member of one of the regional councils of the reforms.

even though crucial, was by no means enough to accredit the person. However, our data clearly points to the fact that the great majority of judges and their deputies were recruited from the narrow circle of *'ulamā',* and hence there was no big surprise as far as appointments went. Moreover, the positions of scribe, deputy-judge, judge, and muftī were all part of a single career path, so that it was not uncommon to see a contender go through some, if not all, such positions in a decade or two. The borderline between a judge and his deputy was indeed very flexible so that the majority went through both positions prior to serving, say, as muftī, administrator, or as a member of one of the regional councils of the reforms.

Second, it is disappointing to learn that very few judges had publications. One would have hoped to find judges pouring over their secrets in some kind of pamphlet or personal note, but that was rarely the case. We are thus left, regarding the venerable genre of *adab al-qāḍī,* either to what the scholars have generously elicited, which was very limited (as can be seen from what Ibn ʻĀbidīn had to say on the matter), or else rely on court documents, which is what we did.

Thirdly, most judges served in a court or two out of the eight (a ninth was probably added later) that Damascus kept throughout the nineteenth century. But few names stand out as having served in practically all the courts, and those invariably, though not always, belonged to a minority madhhab. Thus, those Muslim "minorities" tended to be monitored by even a smaller group at the top than the Ḥanafīs.

Finally, most of those judges were born, raised, lived and died in Damascus, and for this reason biographers were often dismissive of the city for either the birth or death. There were, however, a few judges that came from the "outside," but those were unusual and rare and were restricted to individuals whose families were moving around due to various official appointments, rather than, say, a deliberate policy of some kind to impose on the city judges from the rest of the empire. In short, the appointment of judges was predictable—or well routinized—to the point that not much seems to have changed even with all the reforms that have been implemented in the second half of the nineteenth century. The real change will come only later, at the turn of the century and then during the French Mandate, when the practitioners of the law will become trained as professional lawyers, and then judges recruited from that lawyers' base, which was to become much richer than the narrow circle provided by the *'ulamā'* culture, so that the whole profession will overall become secularized, except for the Ḥanafī sharīʻa courts which were to serve only for personal status matters.

Table 2-1 : 7/7

Table 2-2
Techniques practiced in "friendly" fictitious litigations and their corresponding procedural fictions (ḥiyal)

legal device	plaintiff	defendant	judge	observations	cases
1. debt-procedure Plugged-in several types of cases, procedure might vary from one case to another. *Purpose:* To validate both the identity of the representative who will "receive" the property, and his right of representation (*wikāla*).	1. Plaintiff claims to have a "debt (*dayn*)" with the representative of the defendant.	2. Representative of the defendant acknowledges his "debt." 4. At the request of the representative of the plaintiff and with the approval of the court, the representative of the defendant reimburses his "debt" to the plaintiff.	3. Judge requests defendant's representative to pay his "debt" to the plaintiff.	Final aim is to confirm the identity of the representative of the defendant, his role in the case, and his right to represent his client. Another possibility is that the device establishes an "obligation" from one party to another, considering that only a debt-as-loan does so. In Ḥanafī practice only a debt-as-*dayn* entails an "obligation," while most sale contracts do not.	Land-transfers (C 5-1), waqfs (C 6-1), and tenancy contracts (C 3-3).
2. property-transfers, or the "occupation" (*waḍ' yad*) and hands-off (*raf' yad*) procedure. *Purpose:* To validate the transfer of properties through a procedural fiction so as to render the judge's ruling hard to revoke.	1. Plaintiff claims that the defendant has unlawfully occupied (*waḍ' yad*) her property through usurpation (*ghaṣb*), and therefore requests that it be removed (*raf' yad*) from the defendant's possession. 3. Plaintiff denies defendant's allegations and requests for evidence.	2. Defendant denies plaintiff's claims and replies that the disputed property is her absolute ownership (*milk*), and that she bought it "for a known sum" from X; however, no contract of sale is ever unveiled in court. 4. Defendant brings two witnesses to court to confirm her past purchase of the disputed property.	5. Judge accepts the two testimonies and rules in favor of defendant.	Procedure receives an irrevocable judge ruling that establishes 1) property owned by defendant; and 2) property is milk. Procedure is either a simulated contract of sale, or a property transfer.	Property-transfers only, mostly lands (C 5-1 & 5-2).

legal device	plaintiff	defendant	judge	observations	cases
3. waqf-transfers (or the "three-founders" technique). *Purpose:* To validate the erection of a waqf through a judge's ruling so as to make the act of the waqf (*waqfiyya*) hard to revoke.	1. Plaintiff claims the pre-existence of a debt-contract between him/her and the defendant's representative. 2. Plaintiff then introduces his waqf, its conditions, and list of properties. 6. Plaintiff declares his desire to revoke (*rujū'*) some or all of the conditions of his waqf, as detailed earlier. Abū Ḥanīfa gives the founder such a privilege.	3. Defendant's representative acknowledges the debt, but denies the right of representation for his opponent. 4. Two witnesses testify over the defendant's representative right of representation. 5. Representative acknowledges the modalities of the waqf as stated by the plaintiff. 7. Defendant presses forward the opinions of the two disciples, Abū Yūsuf and Shaybānī, regarding the illegality of revoked waqfs (*'adam al-rujū'*).	8. Judge rules in favor of defendant, that the waqf, under its present conditions, is valid, and that plaintiff has no right to revoke his waqf.	The debt-contract is not a necessary prelude (C 6-2). Always involves the three-founders technique.	Limited to waqfs only (C 6-1 & 6-2).
4. *marṣad,* or investments in the form of renovations in a waqf's property by the tenant, and for which he is seeking 1) a legal acknowledgment, and 2) a long indefinite lease from the waqf's authorities. *Purpose:* To seek a ruling that acknowledges both the investment and the low rent.	1. The plaintiff-tenant describes the reasons behind his (or her) renovations to the leased property, prior to describing the renovations and their cost.	2. Defendant-administrator acknowledges the authorization to renovate but denies its necessity. He also points to the fact that the authorization was never approved beforehand by a judge. 4. Defendant claims that a Ḥanbalī ruling is illegal.	3. Ḥanbalī judge sides with the plaintiff and approves the *marṣad in toto*. 5. Ḥanafī judge ratifies the previous Ḥanbalī ruling.	Roles between plaintiff and defendant might be reversed. Not all cases go through a Ḥanbalī ruling. Few *marṣad* cases could be genuine (C 3-7).	C 3-6, 3-7 & 3-8.

Table 2-2 : 2/4

legal device	plaintiff	defendant	judge	observations	cases
5. equitable/fair price, *ajr al-mithl.* *Purpose:* To fix the price of a transaction through a court's ruling.	1. The plaintiff is usually the seller of a property, and being at the same time the guardian of a minor to whom the property belongs, she would like to seal the deal with a procedural fiction that first questions the price, only to declare it legal through witnesses furnished by the defendant.	2. Defendant denies that the price was unfair and furnishes evidence through witnesses.	3. Judge rules in favor of the defendant-buyer.	The plaintiff-seller is usually the representative of a minor.	C 3-9 & 3-10.
6. sharecropping, *musāqāt, muzāra'a.* *Purpose:* To acknowledge the long-term bail and the sharecropping bonus in kind to which it is attached.	1. The plaintiff-lessor challenges the legality of the lease on the basis (a) the long-term contract; (b) the sharecropping bonus to be paid in kind; and (c) the low rent. 2. Another potential tenant bids for a higher rent.	3. Defendant-tenant responds that a Shāfi'ī judge would approve the long-term lease and the in kind bonus.	4. A Shāfi'ī rules in favor of the contact, prior to its ratification by a Ḥanafī.	Usually limited to waqfs.	C 3-11 & 3-12.
7. homicide settlements, *jināyāt* (s. *jināya*). The procedural fiction consists in the plaintiff accusing the defendant of deliberately killing a kin relative without, however, furnishing evidence for his allegations.	1. Plaintiff alleges that the defendant deliberately killed a kin relative. 2. Plaintiff claims that, being the sole legitimate inheritor to the victim, all compensation payments in the form of a *diya* or otherwise, not to mention the right of inheritance, should be exclusively his (or hers).	3. Defendant requests from plaintiff to furnish evidence.	6. Judge rules that defendant is innocent of the alleged crime, and summons the plaintiff not to pursue the case anymore.	Plaintiffs could be either men or women, while defendants were exclusively male. At times, defendants did take oath to deny all allegations (C 11-4).	C 11-1, 11-2 & 11-3.

Table 2-2 : 3/4

legal device	plaintiff	defendant	judge	observations	cases
Purpose: To reach a contractual settlement between plaintiff and defendant whereby the latter acknowledges to the former that the victim's inheritance is solely the right of the former. Such settlements replace the *diya* (blood-money) as such in that they touch upon the inheritance of the victim rather than on the compensation to be paid by the alleged culprit.	4. Plaintiff acknowledges that he has no evidence to furnish. 5. Plaintiff keeps the right to request from defendant to take oath where he would deny his crime, but rarely does so.				

Commentary: The seven tabulated procedural fictions were all contractual forms that developed through the practice of the sharī'a courts, and hence all constituted "type-contracts," all of which were active at the margin of regular sale and lease contracts. One way to work through the thousands of sharī'a court records available today for the modern scholar is to organize them into contractual forms (seven, in our case), so that once a form has been discovered, and its procedures explicated, then other similar or identical cases should fit within that same formula. Correlatively, if a case comes with an important variant, it could only be fully appreciated in respect to that general formula. There was a major reason why the social actors (or "disputants") opted for these kinds of contractual settlements: to validate once and for all all kinds of transfers between plaintiffs and defendants so as to make the judge's ruling hard to revoke. The alleged "litigations" were thus all obviously fictitious, but that neither posed any moral problems for the judges, nor did it rise the suspicions of the imperial authorities. In fact, and even though such procedures might have been used to illegally transfer public properties into private hands (even though there is no easy way to prove that), their main purpose was to expand the capacities of Ḥanafī practice without, however, challenging its substance. There was indeed a long Ḥanafī tradition of legal subterfuges (*ḥiyal*), and such procedures were additional "logical" and/or analogical extrapolations. For that reason, the meaning of such procedures and their precise order, or the way they served as plug-ins between totally different cases, could only be fully appreciated in reference to Ḥanafī dogma. Needless to say, we need to know for certain when such practices were introduced, and such a task might be feasible from the Damascus records whose seventeenth- and eighteenth-century bound registers have for the most part survived.

Table 2-2 : 4/4

Chapter 3

Why status matters: Contractual settlements and property rights in light of their transaction costs

> "The old should be left to its perennial character [*al-qadīm yutrak 'ala qidameh*]" (Majalla, article 6)
>
> "The essence of speech is in its literal meaning [*al-aṣl fi-l-kalām al-ḥaqīqa*]" (Majalla, article 12)

In any society relationships of different types could be conceptualized as contractual. Only few, however, might have the legal "equivalent" of a contract, meaning that in cases of conflict or litigation, an action could be brought to the corresponding legal authorities. But many contractual relationships, however, do not have an "equivalent" of a legal recognition either, in the form of a statute, code, or a similar codified material. There are several reasons why such a discrepancy might arise, but probably the most common has to do with the fact that legal formulas have to be "invented" first—*invention* ought to be taken very strongly, as an act of radical imagination, one that involves all the creative forces of the imaginary. In effect, the invention of a formula—or a "type-contract"—that fits within a particular legal order is no easy matter, especially in that it takes several generations of testing and experimentation before a formula or code "fits" well within the system and meets the needs of society. It was, indeed, for this very reason, that once the Fertile Crescent and the rest of the Ottoman Empire had been associated to a quasi-mercantile economy whose requirements were monetary transactions and contractual settlements that were not solely status-oriented, that the imperial center found itself in a position to bypass Ḥanafism on many instances, while all kinds of codes had to be transplanted from French law into the Ottoman system. Another example would be the "Reception" of Roman law in early medieval

Europe, a complex phenomenon that implied the learning and teaching of Roman terminology, prior to the acceptance of particular rules and practices. In modern law the Napoleonic *Code civil* (1804) stands out as the biggest of all inventions, one which was to be emulated first throughout Europe and then in the Third World in its colonial and post-colonial periods. (The Ottomans never adopted the *Code civil* into their system, and opted instead for a rejuvenation of Ḥanafism in the Majalla (1877), which became the de facto "civil code" of the Empire.) But there are, however, "inventions" or "receptions" of a much smaller scale, ones that only add a practice to the system, which would have remained imperceptible were it not for a later assessment that would give it its due place.

But there are many contractual relationships with no clear legal protection—one that would at least ensure a routinized legal action—for a variety of social, political, and religious reasons. When, for example, land labor is mostly, if not solely, based on corvée, the peasant laborers, even though in a de facto contractual relationship, are not situated under any legal protection. The "contractual" relationship would then be reduced to the informal customary relationships of the village and household, or to the ones that regulate the affairs of the peasantry with its landlords and tax-farmers, some of which achieve the status of law. Thus, for example, when in the 1840s, or during the early period of reforms right after the Egyptian withdrawal, groups of peasant-farmers began complaining to regional councils against their landlords and tax-farmers, they always did so as a group (*ahālī*) defined in terms of their village and locality. But since there was not much "legislation" or contractual forms that would have protected them from abuse, the council members, who acted as legal honoratiores, had to resort to extra-legal euphemisms in terms of "fairness" and the "well-being of the Empire and its *ra'āyā*" (see Chapter 9 *infra*). The creation of a legally protective framework thus comes only when the group as a whole has been emancipated from its corvée status.

Status mattered a lot in Ottoman societies, and hence one would expect that its impact on contractual settlements was to be equally influential. In effect, status mattered in a variety of situations not necessarily related to law. Thus, religious institutional affiliation provided its bearer a higher status, but so did a bureaucratic post, or a *nisba* to a family, clan, or ṣūfī order. The problem is then to see how such privileges translate into status contracts. One could follow here the broad assertion by Sir Henry Maine, who stated in his *Ancient Law* (1864), that "the movement of the progressive societies has hitherto been a movement from Status to Contract."[1] Or, along a similar conceptual line, Max Weber's assertion that the triumph of the purposive over the status

1. Henry Maine, *Ancient law,* 1864, 165.

(customary) contract, while the freedom of contract itself is correlative to the rise of the modern state and its rationalized legal order,[2] all of which are of great help in understanding the nature of the contractual settlements that we will be reviewing beginning with the present chapter. One should also keep in mind Louis Gernet's reminder that what is transmitted with property and contractual relations is not simply the tangible object itself (what the fiqh refers to as the *'ayn*), but, more importantly, an entire *tradition,* which the ancients visibly translated into rituals, but whose presence in modern law should not be underestimated.[3]

In Ottoman societies contractual settlements overlapped with status in varieties of ways, among them, and most importantly, the ability to secure and impose contractual arrangements because of familial, religious, or bureaucratic (sultanic) privileges. Such privileges, however, were not limited to the contract as such, but also to the proceedings of the court hearings where a particular status affiliation could support the veracity of a testimony, especially since the sharī'a system did not rest on a cross-examination of witnesses. Consider, for example, our first case below (C 3-1), which we will discuss in detail once we are done with our preliminary remarks, and which was a hardly concealed debt, and as in many debt-arrangements, the lender enjoyed a high status and was member of the then declining Shihāb family of Mount Lebanon. Thus, even though that region was more advanced in its credit system than the rest of Greater Syria, the debt-as-loan had to conceal itself in a contract of sale of silk between plaintiff and defendants. The point here is that even by the 1840s debts could not be openly construed as loans bearing an interest, and had to follow a parochial claim of a "harm" inflicted upon the defendants because of an alleged non-performance. But such procedural fictions, because of their complexity and the legal costs they involved, were usually best practiced by the wealthiest groups, including non-Muslims like the Shihābs. Many of the cases that we will be examining either involved a re-working of the terms of the agreement between family members of those privileged groups, or else a bargaining, as in our first case below, between the dominant and the dominated groups (e.g., tenant-farmers renegotiating the modality of their debt).

2. Max Weber, *Economy and Society,* 2:697; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, translated by Tony Weir, 3rd ed. (Oxford: Clarendon Press, 1998), Chapter 24: "Freedom of Contract and its Limits."

3. Louis Gernet, *Droit et institutions en Grèce antique* (Paris: Champs Flammarion, 1982), 35: "Dans la transmission de la propriété et dans les relations contractuelles, il y a un acte auquel les droits anciens attachent une valeur spéciale et qu'ils soumettent parfois à un véritable formalisme, c'est la *tradition* ; même des droits évolués, qui l'exténuent ou qui l'éludent, ont encore affaire à elle. Elle a des conditions, un rituel au point de départ, et des conséquences de droit : elle est, à sa manière, efficace. Or, il apparaît que sa valeur propre remonte plus haut que le droit : ce n'est pas le droit qui l'a inventée."

Of course, even when in a society the bulk of contracts—or the ones that economically mattered the most—were based on status, that did not mean that the middle and popular classes did not participate in contractual settlements of their own. The point here is that the importance of status is accorded to society as a whole. In the previous Chapters (1 & 2), we have seen how the juristic typology among scholars was by and large the outcome of the special status that the latter accorded to one another's writings. Similarly, status contracts are very much, though not exclusively, a product of rank, prestige, and wealth. It was only by the 1860s and 1870s that another logic begins to emerge, and I argue later in the chapter that the Majalla (1877),[4] by placing the problematic of "offer and acceptance" (*ījāb wa-qabūl*) right at the forefront of its contractual rules, "opened" the bargaining process, at a time of increased monetization, to one where the formalities of offer and acceptance had at least to be looked upon as evidence. But it was only in 1922 that an "explanatory memorandum" to the Majalla conceded that the addition of stipulations to the sale contract, which is inadmissible for the Ḥanafīs, must be adopted based on the position of the Ḥanbalīs.[5] If our assumptions are correct—and regrettably research on the Majalla's era, and the *niẓāmī* courts in particular, has been so scant that any generalization on that transitional period proves risky—then once we move from status contracts to a more open and freer bargaining, evidence of a contractual settlement becomes more of a burden to both the contracting parties and the courts—one needs only to think of the importance accorded to "consideration" in nineteenth-century American common law.

But even when purposive contracts begin to predominate in a process of quasi-monetization, or thanks to a reform of external influence (e.g., the Napoleonic codes), status still matters a lot, and it is possible to argue that its importance has not withered with modernity. Besides the fact that modern civil codes contain many residues of the past,[6] and should therefore be looked upon as a continuum with tradition, it is no difficult matter in non-democratic societies to find individuals or groups, often directly linked to the state, that would impose great limitations on the freedom of contract in

4. The Ottoman *Mejelle-i Ahkam-i 'Adliyye* (Majalla) was promulgated in 1877 as the Civil Law of the Ottoman State. It consists of an introductory part comprising 100 "general rules," based for the most part on Ibn Nujaym's *Ashbāh,* and which lay out some of the basic principles of the Ḥanafī madhhab. The other parts consist of a reorganization of the Ḥanafī law of contracts and obligations.

5. Oussama Arabi, "Contract Stipulations (*Shurūṭ*) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya," *International Journal of Middle East Studies* 30, n° 1 (1998): 29-50.

6. The odyssey of the modern secular civil codes in Islamicate societies began when the Majalla was replaced in Turkey in 1926, as part of wide-sweeping reforms that were meant to separate state from religious institutions, by a new civil code; that was to be followed by Lebanon (1932), Syria (1949), and Iraq (1953).

hope of maintaining a monopoly over the circulation of commodities and their production.

The predominance of status contracts in agrarian societies

A history of contractual settlements between the end of the eighteenth and the first half of the nineteenth century invariably leads to the realization that not much has changed in terms of the predominantly agrarian nature of the societies in Greater Syria and the Fertile Crescent, an outcome of the inherent weaknesses of the commercial classes (or mercantilism in general). The significant changes only came through by the second half of the nineteenth century, in particular with the promulgation of the Majalla as the new contractual code in the late 1870s, not to mention the newly drafted commercial and penal codes, whose original material was French, but whose departures from the latter should not be underestimated.[7]

The agrarianate[8] nature of those societies can be detected from the contractual settlements that centered mostly on property titles and only little on the exchange of fungibles, for which no sophisticated codes ever evolved. Thus, while the bulk of exchange reflected the consensual nature of those societies in terms of such values as honor, family, socio-economic networks, and inequalities imposed by hierarchy and status, it was nevertheless mostly limited—at least in its most significant aspects—to landed property. Such a restricted exchange gave birth to a law of contract, which despite its sophistication in some areas, was even more limited by the conditions of property and the domination of state ownership in agriculture. Thus, not only were land titles a major obsession, but, even more so, exchange worked solely in terms of such substantive notions as fairness, equality, and simultaneous delivery. Transaction costs, which usually consist in the ability to bargain, negotiate, find the relevant information on possible partners or buyers, and the taking of risks in a non-simultaneous exchange, were minimized by limiting exchange, whenever possible, to the family and clan, or at best to one's socio-economic network. Within such a framework, one that precluded individualism and competition or the harsh and risky nature of individual deals, contracts

7. As pointed out in George Young, *Corps de droit Ottoman* (Oxford, 1907), who footnoted some major differences between the French and Ottoman penal and commercial codes.

8. In the sense of Marshall Hodgson, *Venture of Islam,* vol. 1 (Chicago, 1974), 107-9, as agrarian societies whose values were determined by the culture of urban centers, through which taxation was imposed and the surplus was exchanged with other commodities produced in the cities.

were not open for future liabilities such as a possible assessment of damages in the case of non-performance. Indeed, the law of contract was mostly limited to title restitution in the case of usurpation (*ghaṣb*), while it avoided venturing over issues of compensation for damages or injury, for which it was not prepared. The remedy for usurpation was therefore limited to a restitution of the title to the plaintiff, without further compensation for damages. Moreover, genuine cases of usurpation were rare, in particular that allegations for illegal occupation (*waḍ' yad*) became the norm and served as procedural fictions to furnish evidence for a property title. Thus, even though legal subterfuges, known as *ḥiyal,* were not foreign to Ḥanafism (beginning with a treatise by Shaybānī on the matter), and served as means for expanding substantive aspects of the fiqh that could not have been formulated otherwise, the procedural fictions that flourished in Ottoman times, and which incorporated notions of litigation (*khuṣūma*) with evidence (*bayyina*), served mostly as evidentiary tools in the restitution and transfer of property titles (see Table 2-2 *supra*), without, however, touching much on substantive issues.

If contract is to be generally looked upon as a total phenomenon rather than be limited to exchange, the realization will soon come that in such societies the symbolic nature of exchange, whether *ex gratia* or for other more mundane purposes, was what had prevailed throughout the Ottoman period. In fact, whenever we look at economic history in association with the legal institutions that make exchange possible, there is an immediate realization of the fragile nature of contract, which was mostly geared towards quasi-simultaneous exchange: both obligation and an allocation of damages become superfluous as the notion of contract is narrowed to its bare minimum. Contract becomes significant and assumes a wider more complex role only when the transaction cannot be immediately fulfilled and an uncertainty hovers over performance: obligation would then come into the picture as a significant improvement. Ḥanafī practice, however, has little to say on obligations (*iltizāmāt,* or *mūjibāt*) because it mostly assumes the immediate delivery of the *amwāl,* and only in the case of debts, which cannot be solely associated with a tangible object (*'ayn*), is there an explicitly stated future obligation. Debts were thus used in procedural fictions for title restitution precisely because the promise to deliver was tied to a future obligation. "Executory exchange" had therefore to wait for the *niẓāmī* courts of the second Tanẓīmāt, but in the absence of detailed studies of the proceedings of those courts, it is impossible to guess how far it was enforced.

But the limitations on contracts notwithstanding, the courts had nevertheless to construe their cases on what looked like hard bargaining and evidence, and the idea was to create objective (hence ritualized) criteria of negotiation which avoided conflicting individual wills. In effect, conducting negotiations on the

uncertain grounds of competing individuals was a costly operation that the courts could not have possibly handled. Procedures went therefore through safer and more routinized routes which tied bargaining with few variables such as property titles and fair pricing, while evidence either came in the form of direct witnessing, or else was an outcome of well thought out procedural fictions.

Procedural fictions (or fictitious litigations)—I use both interchangeably—construed around the notion of "fair price," sealed each case with the idea that both parties bargained fairly for the *ajr al-mithl,* cutting any remote possibility that the ruling might be revoked on the basis that the price was unfair. Procedures notwithstanding, the just-price notion reflected values of commodities not assessed in terms of labor or production, but with reference to the nature of the things themselves, or to their intrinsic value (*al-qīma al-ḥaqīqiyya*). The procedural fiction thus consisted in positing the intrinsic value as the just price, or at least as close to one another as possible. Moreover, not only the just price had been duly bargained for, but even challenged by a third party (e.g., in some sharecropping contracts, see below). In such cases, the just-price procedure was no more than a device to legitimize the low rent. (A modern system would accept conflicts of interest as part of the bargaining process that the courts learn how to handle.)

Even though the notion of property as *māl* was broad enough to include all kinds of fungibles and non-fungibles, the bulk of transactions centered by and large on landed properties, and many procedural fictions, constructed on the notion of illegal usurpation, aimed at inter-family transfers of title deeds. The remedy for usurpation was therefore limited to a restitution of the allegedly lost title to the plaintiff (or the defendant, depending on the construction of the case), without any damage compensation. The system as a whole was therefore ill prepared to deal with the exchange of fungibles, in conjunction with a freely competitive market with different and conflicting interests. The objective criteria of liability and evidence have also greatly contributed in creating a system where formalism prevails in the dubious process of fact-finding. Thus, in criminal homicides, for example, what was known as "the tool of the killing" (*ālat al-qatl*) was enough all by itself to serve as an objective criteria to determine intention (e.g., a sharp metallic object could not be casually used with no intent to kill), and to serve as the *corpus delicti.* In the *mu'āmalāt* cases the objectification of evidence came at three interrelated levels. First, custom came to be perceived as a crucial reference for judicial decision making, reducing the possibility for a plaintiff to pose the claim that a misunderstanding of some sort took place because the contractual habits of a particular locality were not taken into consideration (see Chapter 1 *supra*). Second, cases that involved a title transfer—even over the administration of

a waqf (Chapter 6 *infra*)—were generally construed around the notion of a fictitious *khuṣūma,* which gave both parties the occasion to provide their case with a semblance of a bargaining, which in itself was "evidence" that both parties were firm behind their positions. Third, and in various contractual practices, Ḥanafīs have pushed for all kinds of external signs of consent—particularly in speech, since a record was anyhow perceived to be more binding—so as to minimize a messy trial in the case of non-performance. In short, the system opted for objective criteria in speech and behavior, and defined them as clearly as possible, rather than open the way for various socio-economic practices to competitively find their niche within the judicial language of the courts.

There was probably even more formalization to come in the 1870s and later. For one, such a change could be perceived in the Majalla itself and in the way a more open contractual realism began to be forged. Such a change is noticeable, for example, in the way the offer-and-acceptance formula, which was known in the Ḥanafī literature as *ījāb wa-qabūl,* while confusingly marginal even in the late *shurūḥ* manuals such as the *Radd,* achieved a central status in the Majalla. This was probably due to the socio-economic changes that became even more visible by the second half of the nineteenth century. By that time, the situation must have been increasingly in favor of "open" contractual settlements when exchange had to opt to more goods and services, while land, thanks to the 1858 Land Code, became even more commercialized. The Majalla, which in its core integrated the Ḥanafī law of contract, reconstructed that code by giving the *ījāb* notion the center stage it always lacked in the more canonical formulations.

Limitations of Hanafi contracts

It is known that Ḥanafīs generally accept several contractual forms, which, however, scholars have refrained from subsuming under one broad formula, so that there is no general law of contracts as such but only individual rules relating to sale, hire, tenancy, sharecropping, partnership, wills and inheritance, marriage and divorce, and debt. Following Kasānī's *Badā'i' al-ṣanā'i',* the Egyptian legalist 'Abdul-Razzāq al-Sanhūrī detected eighteen different contractual forms,[9] which most Ḥanafī treatises adopted but with no particular order that would point to their interconnections and historical underpinnings, or that at least would bring some under particular headings. In that respect,

9. Abdul-Razzāq Sanhūrī, *Maṣādir al-ḥaqq fi-l-fiqh al-Islāmī*, 6 vols in 2 (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 1:78.

even the structural organization of the various *shurūḥ* manuals in terms of the order of chapters, sections, and headings, is not that helpful either and might lead to confusion. However, we know for certain that the contract of sale was the norm and that other contracts—in particular those related to hire—were construed in analogy to sale, hence the notion of *tamlīk al-manfa'a* ("the possession of usufruct") in tenancy contracts.

The difficulty in creating a general theory of contracts, and the proliferation of individualized contracts throughout the Ottoman period, only point to the status of law in such societies and its effect (or lack thereof) on the productive forces of society. To begin with, if we agree on defining Ḥanafī practice as a "special law," meaning a set of normative rules, which would include both customary practices and the ones administered by the fiqh, and which create societal settlements without much state intervention, then the proliferation of contractual forms and their corollary settlements in the courts (which usually required procedural fictions), could be explained by this lack of centralized power as far as law is concerned. To be sure, there is no immediate correlation—or a causal relationship—between a centralized state and a coherent law of contract, property, tort and crime, but the point is that it would be very difficult to achieve a minimum of consistency without some minimal governmental regulations working for that purpose. Otherwise, society would be left to its own mix of customary norms and the rules that it inherited from previously influential traditions. Moreover, Ḥanafism could hardly be described as a system of precedent, judge-made law, or case law for that matter. All such notions would assume, again, the existence of a powerful central state closely monitoring the activities of the courts, in addition to a system of keeping track of precedent from all adjudicated cases with the aim at creating a typology of relevance among them. The Ottoman state was neither centralized nor decentralized (it was probably a "confederated" state), and such terms are usually only relevant in the context of the European history of Absolutism and the nation-states that followed. In those cases, centralization would not only have implied a "control" of the populations and their resources, but rather a process of control through homogenization, individualization, and discipline. By contrast, the Ottoman state looked more like a confederation of societal systems loosely linked together, to the point that when the state had to create its own legislation—mostly to regulate the affairs of its own bureaucracy—it established a system parallel to the sharī'a courts, which in many instances functioned quite differently from the latter and was "outside" its preoccupations.

To be sure, a centralized state, in the rare occasions when it can exist at a particular historical juncture, is an outcome of societal conditions which in turn push towards law reforms. Thus, a liberal laissez-faire economics

pushes towards "free contracts" and legal formalism, while the nature of the economies of the Ottoman Empire, in all their privileges and status hierarchies, would favor judicial practices with very partial rationalizations, at least ones that would tend to favor groups whose sense of mercantilism might be advantageous to society. The partial rationalizations that we tend to see in many of the Asiatic empires, even if they turn out to be effective, end in the last resort as state measures for a better management of the fiscal resources. In other words, they rarely connect with other forms of rationalization, and hence seldom reshape society on new grounds.

Finally, the nonexistence of a general law of contract is in relation to the organization of the judiciary, which is probably the most influential factor among all explored thus far. In fact, most members of the judiciary were recruited from small *'ulamā'* circles which for the most part adhered to the tradition of their school, and which for the later part of the Ottoman period meant being faithful to interpretation through the *shurūḥ* texts.[10] The point here is that in a non-competitive atmosphere where judges, muftīs, and jurists were all drawn from the same pool and all shared the same education, with careers that often overlapped between the various judicial functions, there was no motivation to go beyond what the tradition had already prescribed, while *mujtahid*s maintained their discretionary powers by adding to those layers of opinions. In short, abstraction, codification, and homogenization are all tools of control and centralization of power, which by and large proved unnecessary for the societies under study, but all of which became a major concern throughout the Tanẓīmāt.

Despite the confusion that reigns in understanding the nature of contracts and the historical order in which they began to appear since the formative period of the fiqh, the contractual form known as the *ījāb wa-qabūl* does seem to be the most general one in that it is neither specific to a particular type of contract, such as hire or sale, nor is it linked to conditions that would render it impractical. But it is uncertain whether the "offer and acceptance" form was historically the oldest of all contracts, or whether the other contractual types were derived from it in one way or another. In fact, a great deal of research is needed before it is possible to determine which form predominated first and why other forms turned out to be necessary, and whether the new forms connected in any way with the old.

In its simplest form, the "offer and acceptance" implies that at least two persons are involved in offering something and in accepting that same thing from one another. Moreover, even though the acceptance does not have to be

10. See Chapter 2, "The culture of judges."

instantaneous, the offer and acceptance need to formally take place in a location legally defined as the *majlis,* or since offer and acceptance, once completed by both parties, implies a de facto contract, the location is more accurately known as *majlis al-'aqd.* Anything from sale, hire, debt, donation, or loan, could all be concluded under the general formula of offer and acceptance. The question then is, since the fiqh did possess a general formula, why didn't the law of contracts proceed from such a general formula towards more abstraction and systematization, i.e., going from the more complex to a simple abstract formula, rather than the other way round? In fact, what we notice is that, historically speaking, the tendency was towards a proliferation of specific "nominated" contracts, or *al-'uqūd al-musammāh.* This could be partly explained by the fact that the fiqh prohibited contractual forms that involved either the *ribā* or the *gharar,* or more broadly, the *contrat aléatoire.* Thus, the desire to reduce risk-taking, if not to eliminate it altogether, led to constraints imposed on all kinds of contracts whose object is not immediately available for exchange. That led to all kinds of contracts, such as sharecropping, debt, and *istiṣnā',* to whom many stipulations (*shurūṭ*) were attached to avoid uncertainty and an over-valorization of the yet-to-be-produced object of exchange. In short, an ideal contract would be one in which a *'ayn* is exchanged for another *'ayn* of "equal" value—meaning, without any "excessive" profit—and the contract itself, the offer and acceptance, would transfer the *milk* title of ownership from seller to buyer. In fact, it is well known that most contracts do not engender obligations as such (*iltizām*) since the offer and acceptance itself, i.e., the contract, transfers the property even before the buyer effectively receives it.[11] In other words, the fiqh would like to guarantee the buyer an immediate right over the tangible object, *ḥaqq 'aynī,* or what might be called a "real right" rather than a "personal" one. This was in direct contrast to Roman law where "ownership was not transferred until the thing was actually handed over,"[12] which renders a contract, generally speaking, "as an agreement between two or more persons whose main legal consequence is an obligation with an effect more personal than real."[13] One could say that the fiqh directly reversed that formula: the effect is more real than personal ("real" in the sense of *'aynī*), and the contract would not in principle create an obligation since the property title is immediately transferred to the buyer by virtue of the contract itself, even before the property had been effectively transferred. That's why the

11. Sanhūrī, *Maṣādir,* 1:17-18.

12. Alan Watson, *Roman Law and Comparative Law* (Athens, Georgia: University of Georgia Press, 1991), 63.

13. Watson, *Roman Law,* 123.

debt poses all kinds of problems and could not be looked upon as one of those regular *'ayn* transfers. In fact, had it been so, the offer and acceptance would create a contract in which the debt becomes the property of the debtor with no obligation on his part to give it back. But what differentiates a debt from a regular *'ayn* exchange is that the former is a "personal right" because the borrower's willingness and obligation to pay his debt are a matter of consciousness, *dhimma.*

A final remark on this failure to abstract and rationalize: Islamic law failed to conceptualize money as such, and hence would not openly legalize monetary transactions. The exchange of money for money, which in principle should generate interest, would only make sense (1) if money is looked upon as a *special* commodity whose "utility" is precisely in creating a common denominator for exchange for *all* commodities; and (2) if the generated interest is in lieu of the services provided by money; hence money is not supposed to be a "neutral" medium. Because price for the use of money has never been properly conceptualized, legal-tender money, such as the bill of exchange, was a very late evolution in Islamic societies.

The economics of contracts

A major source of confusion regarding contracts is whether a contract *obligates* the other party to perform. In other words, is there a Ḥanafī theory of obligations, one that would place a burden on the other party to perform, and one that assumes that between the contract and its performance a considerable amount of time might elapse? The question is even more pressing considering that a breach of contract, or a delay in performance, might trigger a court action for restitution, but with no compensation for the loss in profit that the plaintiff might have incurred. In other words, how significant is a theory of obligations without a solid tort law? One could, of course, argue that even if compensation does not come into the picture, a breach of contract, when backed by an obligation, implies restitution, hence the importance of the former. And, in conjunction with many cases in this study, regarding property rights, our main argument assumes that, considering major ambiguities in property law—on ownership, possession, and taking—property rights were fought for under the umbrella of contractual rights, so that the latter would guarantee the status of property rather than the other way round. In all this, the law of contract, in addition to contractual rights and settlements guaranteed by the courts and other legal instances, were the centerpiece of Ḥanafī practice—a role that was accentuated by weaknesses in both tort and property laws.

In his pioneering studies on contract, the Egyptian legalist 'Abdul-

Razzāq Sanhūrī noted that "rarely do we have in the Islamic fiqh obligations [*iltizām-āt*][14] that are the outcome of a contract."[15] The reason being that upon the completion of a sale, the right over the tangible purchased object (*ḥaqq al-'ayn*) "consists of the power that the law gives to an individual specifically over that tangible object." Thus, the obligation for the object (*iltizām bi-l-'ayn*) consists in the seller delivering his product. However, since the obligation of the ownership of the object implies that, once the object has been delivered to the buyer, the obligation has been fulfilled, the fiqh does not acknowledge that a sale contract entitles an obligation *per se* since both the transfer of the object and its ownership are supposed to be instantaneous with the contract, hence there is no need for an obligation that assumes a time lag in performance. In other words, since Islamic contracts assume in their essence a simultaneous (or virtually simultaneous) performance, obligation becomes redundant. Moreover, since the seller's liability is limited to restitution without damages in the case of breach of contract or the selling of a damaged product, tort law becomes redundant in that case too. Considering that a basic function of simultaneous contracts is to minimize risk, the general tendency in Islamic contracts is then to reduce the allocation of risk between buyer and seller, creditor and debtor, employer and employee, or landlord and tenant, to its lowest levels. In fact, a higher risk situation would imply higher information costs for the parties concerned: people would not be willing to assume more risks without the needed information that such risks are worth taking. But in societies where knowledge is *personal,* that is, knowledge of others and of the community is personally assumed, rather than through institutions, objective information, or printed materials, all information becomes collective (or kin-oriented), involving few or no secrets, so that long-term risky contracts with unforeseen events might strain the harmonious relations within a community based on a delicate equilibrium between clans and groups. Thus, with its emphasis on virtually simultaneous and equal contracts, while disfavoring long leases, interest loans, and excessive gains, or contracts where the sold object has no existence yet (*ma'dūm*), Ḥanafism operates within a de facto minimization of risky and unforeseen events, while rendering obligation redundant.

Rather than proceed from the concrete to the more general and abstract, the movement in the law of contract has been in the reverse order: a general form did exist—that of *ījāb wa-qabūl*—but instead of accepting any contract within the

14. Also referred to as *mūjib-āt* (s. *mūjib*).

15. Abdul-Razzāq Sanhūrī, *Maṣādir al-ḥaqq fi-l-fiqh al-Islāmī*, 6 vols. in 2 (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 1:14.

boundaries of that form, a plethora of contractual forms came into being, and, as far as the Ottoman period is concerned, even more forms flourished. Thus, based on Kasānī's *Badā'i',* Sanhūrī already detects eighteen different "named contracts."[16] Is there a logic that organizes such contracts? Contemporary scholars such as Sanhūrī and Chehata, pressed by modern juristic needs, have attempted a more rational organization of those named contracts, which the fuqahā' in their extreme pragmatism never did. But whatever the merits of their classifications, they fail in providing a logic for the historical appearance of particular contracts. Suppose we accept Kasānī's eighteen named contracts as valid; we still need to know the historical order of their appearance, and the region in which they first arose prior to their generalization. In fact, contracts first erupt on a customary basis from the needs of a particular community, then receive a gradual acknowledgment from judges and lawyers, prior to their official categorization in the fiqh literature. An historical knowledge of contracts (and obligations, if any) proves necessary to assess the economic needs behind them.[17] Moreover, an historical investigation would be helpful in explicating that need for more and more contracts rather than be limited to the general form of *ījāb wa-qabūl.* In a strange and intriguing way, the fiqh had a general contractual formula, then added to it all kinds of constraints and prohibitions, only to acknowledge a plethora of individualized contracts for a specific exchange. As Alan Watson rightly noted in his pioneering analysis of Roman law, we need "to explain why each contract arose when it did with the characteristics that it had."[18]

My intention in this chapter is regrettably much more modest to the point of disappointment. I will begin first with the general contractual formula of offer and acceptance, which was acknowledged as such in the Majalla, and then move to earlier nineteenth-century fiqh texts and work out variations of that formula. The genuinely interesting part comes once we have the opportunity to work out even more variations from the contractual settlements that emerged from the sharī'a courts, in particular the procedural fictions that paved the way for the many contracts that were not limited to simultaneous and equal exchange. In short, the law of contract evaded substantive change by permitting for a growing number of "unnamed contracts [*'uqūd ghayr musammāt*]." During

16. Sanhūrī, *Maṣādir,* 1:78.

17. Chehata's *"méthode historique"* (*Théorie générale de l'obligation en droit musulman hanéfite,* Paris, 1969*,* 49) has nothing historical since it fails to detect the order in which contracts emerged. It rather proceeds deductively by constructing a rational and abstract contractual form from the multiplicities of contracts that are detected in the fiqh manuals. However, the historical order of those contracts was not Chehata's main concern (see the following section below).

18. Watson, *Roman Law,* 122.

the second half of the nineteenth century, a time of intense judicial reforms, the Ḥanafī law of contract was in essence saved thanks to the effort of the Majalla. But as Chehata rightly noted, the Majalla's attempt in systematizing the law was a big disappointment as it simply accumulated numbered definitions without much logical order.[19] A non-systematic law of contract persevered therefore side by side with quasi-modern penal, commercial, and land codes.

Obligation thus only manifests itself as a debt (*dayn*). The debt establishes a "personal right [*ḥaqq shakhṣī*]" between creditor and debtor, hence the latter owes the former, as safekeeping (*dhimma*), the debt. Thus, the *dhimma,* being the responsibility of the debtor, becomes an obligation. In contrast, in a contract of sale, where both the commodity and its value have been simultaneously exchanged, obligation is no more an issue. There will be, however, an obligation on the part of the buyer in the case of deferred payment: the value of the commodity will then be a debt in his *dhimma.* The fiqh thus perceives that a debt entitles for an obligation, even though the exchange of a *'ayn* would not, while the western traditions would not distinguish between the two: a debt is a commodity like any other (so is money in general), and hence its exchange establishes an obligation. By contrast, in Ḥanafism the debt is another one of those "named contracts" that deviates from the general formula and for which the fuqahā' have established a special set of rules. What is then the purpose of such a categorization? For one thing, such societies tend to minimize risk and unforeseen events, so a broad formula works well for simultaneous and equal contracts, but then, considering that the majority of contracts are not of this order, other specific contracts had to be designed for debts, waqfs, donations, sharecropping, or to even more specific contractual settlements.

Since the debt cannot be tied to a specific *'ayn*—that would have been possible only if money was among the category of *a'yān*[20]—it was postulated as an obligation on behalf of the borrower, while the lender keeps a personal right until all the debt is fully covered. But even though the exchange of any commodity gives the buyer a right over that *'ayn,* Sanhūrī warns us that "the distinction between *dayn* and *'ayn* is different from the one between a personal right and a right over an object."[21] Thus, the personal right and its corresponding obligation is a legal link between creditor and debtor: the creditor enjoys a personal right over the debt he transmitted to the debtor, while the latter has

19. Chehata, *Théorie,* 58.

20. Muḥammad Rawwās Qala'hjī, *al-Mu'āmalāt al-māliyya al-mu'āṣira fī ḍaw' al-fiqh wa-l-sharī'a* (Beirut: Dār al-Nafā'is, 1999), 36: "Money has a value but is not a tangible object (*al-nuqūd qīmat-un wa-laysat a'yān-an*)."

21. Sanhūrī, *Maṣādir,* 1:18.

an obligation to give it back in due time. By contrast, there is no "other side" in the right over a *'ayn,* and hence no obligation from another party: it is a right that a person exercises over something fully owned. Herein lies a basic difference with all western traditions deriving from Roman law in that they generally perceive "a contract as an agreement between two or more persons whose main legal consequence is an obligation with an effect personal rather than real."[22] One could safely assume that the fiqh would ideally envisage each contract as having a real effect over a *'ayn* rather than a personal one: any delay in the act of exchange meant more rules and counter-rules to the point that the fiqh favored "real contracts" over "virtual" ones.

Some of our cases pose an intriguing "debt" problem (C 3-3, 5-1 & 6-1 *infra*). At the beginning of those cases, once plaintiff and defendant have been introduced to the court through their representatives, the latter will then exchange claims regarding a "debt" that the defendant's representative owes to the plaintiff. I have argued that such alleged "debts" were no more than procedural fictions that maintained a representative's identity. In fact, since the purpose of the fictitious lawsuit was to transfer property—that is, a *'ayn*—between plaintiff and defendant, the debt implied an obligation between the two, while the transfer itself did not. In other words, the procedural fiction first created a fictitious obligation in the form of an alleged "debt," prior to the property transfer as such.

Which brings us, once more, to the law of property, and how contractual rights helped in establishing property rights. To begin with, in such societies, the ubiquitousness of possession (or occupation) favored those individuals that could prove that their occupational rights were legal, and from there, through court action, their ownership rights were validated. Thus, possession was a middle ground between ownership and tenancy. Since ownership entails full possession of the *'ayn,* the owner enjoys the right to use the *'ayn,* as well that anything that it produces, in addition to usufruct rights. Such a full right over the *'ayn* was, however, hard to maintain in societies where kin and land mixed together, and where the physical and legal costs of maintaining a *milk* property were prohibitive. Such difficulties provided a leeway for both possession and tenancy rights. In fact, a tenant has a right to benefit (*ḥaqq manfa'a*) from the leased property, "which is closer to a right in the *'ayn* than a personal right."[23] A personal right would have implied an obligation, but since only debts are endowed with such privilege, the tenant keeps a right to benefit from the *'ayn,* which has often been confusingly interpreted as *tamlīk al-manfa'a.* Similarly, an inheritance is a *manfa'a,* which the inheritor holds and takes possession

22. Watson, *Roman Law,* 123.

23. Sanhūrī, *Maṣādir,* 1:32.

of upon the death of the benefactor; while a waqf's *'ayn* is not possessed by anyone, but whose *manfa'a* goes to the beneficiaries. Such subtle distinctions are meant to avoid contracts with obligations, in a manner similar to debts. Thus, if a debt is linked to an obligation, it is because the fulfillment of a debt assumes—in the old notion of gift—a time lag, and that's precisely what had to be avoided in the various categories of contract, all of which derive from the general offer and acceptance formula. It is as if the fuqahā' did their best to avoid obligation altogether, reduced it to debt only, and then constructed a plethora of contracts, all of which were either based on the ownership, possession, exchange, or use of the *manfa'a* and/or its *'ayn.*

Offer and acceptance in the form of *ījāb wa-qabūl* is therefore to be looked upon as the most general formula of the law of contract. But general in what way, and how effective and trustworthy was it as a contractual form? As far as the role of the courts in enforcing contracts was concerned, the offer and acceptance was indeed the most common formula but only for acts of sale and tenancy, mostly in urban areas. Thus, within cities and their surrounding areas, the sale and lease of homes and shops was quite widespread, followed by the sale and lease of small lands (often referred to as "gardens"), all of which constituted the bulk of the sharī'a courts transactions. Such transactions did fit well within the offer and acceptance formula simply because performance was expected to be immediate, meaning that there was no "debt" in anyone's *dhimma,* hence no obligation of any kind. The offer and exchange formula was simple and direct enough so as not to include any procedural fiction, and its greatest advantage was that there was a promise beyond the immediacy of the exchange, while the presence of witnesses sealed the formality of the contract (C 3-2). But the sharī'a courts only document contracts that have been finalized—i.e., whose offers have been accepted and thus concluded—and, more importantly, considering that the offer and acceptance could be orally concluded, only those who decided to formalize their promises in writing did so in court, even though the possibility of sealing a contract in writing outside the courts was also possible.

Both Schacht and Sanhūrī argued that Roman law had no such general formula, even though scholars tend to agree that the *stipulatio* (or *sponsio*), which goes back to the fifth century B.C., was definitely an offer and acceptance oral contract.[24] Similarly, in common law, "the bilateral executory agreement" holds a similar position, even though in the latter "When the contract is made, it binds each party to performance, or, in default, to a liability to pay

24. Watson, *Roman Law,* 53: "It was an oral promise in which the person to whom the promise was to be made asked the other if he would give or do whatever it was, and the other would promise, using the same verb. The question and answer had to be exchanged orally, the promise had to correspond exactly to

damages in lieu. Prima facie these damages will represent the value of the innocent party's disappointed expectations."[25] A major difference, however, is that the *ījāb* entails no obligation since the agreement is consummated with the contract itself, meaning that whatever had to be done should have been done with the conclusion of the contract, and with no obligation there is no liability to pay damages for non-performance. Hence, at common law, since an offer and acceptance contract implied futurity, obligation, liability, and the possibility for compensation, there was no need to create a distinct formula for, say, debt or donation. By contrast, Ḥanafism maintained a much more static formula, and, beginning with debt, other contracts had to be devised to address possibilities of delayed performance. Thus, court documents show a shift from a regular contract to debt when a delay in performance imposes itself: the plaintiff sues because the defendant owes him, in his *dhimma,* part of the merchandise he promised to deliver. In effect, the language of debt becomes effective whenever there is breach of contract, or a delay in delivery, or a promise to deliver, or a damaged commodity, or even when a harm has been caused willfully or negligently. The simultaneous nature of the *ījāb,* where the contract is consummated with the transfer of property, and hence obligation rests at this point, pushes disputants to other contractual formulas—debt in particular—to express their grievances. To understand the nature of contract in Ḥanafī practice, one must therefore see how a large number of contracts had to be accommodated outside the general formula, which, in our case here, implies going back and forth between legal doctrine, *shurūḥ* and *fatāwā* texts, and court documents, in addition to the regional councils and sultanic ordinances, to trace the movement of contractual language. The picture that emerges is one of a proliferation of contracts and grammars: on the one hand stood the simple and efficient language of offer and acceptance; but, on the other, and for nearly as many contractual cases, disputants had to make their

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the question, and no delay was to intervene between the question and answer. This means, of course, that the parties had to be face-to-face and the contract could not be made at a distance by letter." But while the *stipulatio* "bound only one of the parties," the *ījāb wa-qabūl,* as Joseph Schacht argued (*An Introduction to Islamic Law,* Oxford, 1964*,* 22), was a "bilateral construction" since *ījāb,* "making something *wājib,* means etymologically not 'to offer' but 'to make definite, binding, due,'..." Moreover, the *ījāb* formula could be oral or written, and a delay for acceptance was possible, and, at least for the Ḥanafīs, the location of the offer and acceptance, known as the *majlis,* had to be one in principle, but this "oneness," however, was the subject of a long line of interpretations.

25. P.S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), 12: "It consists of an exchange of promises; the exchange is deliberately carried through, by the process of offer and acceptance, with the intention of creating a binding deal. When the offer is accepted, the agreement is consummated, and a contract comes into existence before anything is actually done by the parties. No performance is required, no benefit has to be rendered, no act of detrimental reliance is needed, to create the obligation."

way through a diversified scheme of contracts, procedural fictions, and alleged debts and counter-debts.

Even though we are dealing in this chapter with several of the contractual formulas each one on its own, I would like to begin with a case that fits well with my introductory statements as it brings together some of the concerns stated above: in the absence of well defined obligations, remedies, and liabilities in Ḥanafī practice, what were the alternatives open to plaintiffs whenever the defendant failed to deliver, or delivered a faulty product but refused to acknowledge it, or delayed performance ad infinitum? Such questions open the way towards the much broader issue of the economic efficiency of the law of contract: was the process of creating procedural fictions, as an addendum to contract law, hence an indication of the inefficiency of the latter? And did these fictions help in a readjustment of the system?

[C 3-1] In a case heard in Beirut in 1846,[26] the plaintiff Emir Khalīl b. Bashīr Shihāb,[27] was doubly represented: first by his wife Nasīm bt. Emir Ḥaydar Shihāb (the Shihābs married mostly among cousins, or else to Circassian slave women), who in turn had her own court representative, Ayyūb Ṭarābulsī, a Christian from Dayr al-Qamar (all Christians and Jews were specifically identified as such). It was therefore Ṭarābulsī himself who confronted the defendant Raphael Mishāqa, also from Dayr al-Qamar, regarding an alleged debt of ten piasters that the latter owed to the Shihābī Emir. The plaintiff claimed that the Emir had summoned his wife to receive the debt and litigate against the Dūmānī sons, while she in turn had delegated both requests to Ṭarābulsī. The defendant acknowledged the debt, but denied both representations: that of Ṭarābulsī to the Emir's wife, and the latter to her husband. The court then went through a routine procedure in which the representative's identity and right of representation was confirmed through witnessing. Since we will be discussing in the following chapters the procedural fiction of the debt and its purposes (C 5-1 & 6-1), I will only note here that its major raison d'être was a validation of the representative's identity who will eventually "receive" something (a property, money, or an acknowledgment) from the other party, so that his right to represent and thus "receive" is ratified through a judge's ruling and thus becomes irrevocable. By contrast, the representative who will "donate" will remain unchallenged, and his actions will be accepted without the process of validation. One way to understand such a discrepancy is to conceive of the "transfer" as a "debt" that the transferor owes to the transferee in his *dhimma.*

26. Beirut sharī'a courts, unnumbered register and document, 18 Dhu-l-ḥijja 1262 (7 December 1846).

27. We will come across Emir Khalīl Shihāb, son of Bashīr II, a couple more times (Chapter 5 *infra*).

Thus, considering that the most common *ījāb wa-qabūl* contract remained short of obligations, and hence of any sound principle of restitution and tort, disputants who claimed any wrongdoing, negligence, delays, or a breach of contract from the opposing party had to frame their case as a "debt" that the defendant owed them. In effect, only the debt-contract implies an obligation since the debtor owes the refund in his *dhimma.* In short, the debt-contract had become a procedural fiction for several contractual forms where either performance proved problematic, or something emerged later that could not have been contained within the clauses of the original contract. Those debts were thus in effect nothing but quasi-contracts of restitution resulting from pervious contractual settlements whose performance turned unsatisfactory. The contract is thus redrafted in the form of a court litigation—a "debt" that the defendant had not paid yet—so as to come to terms with the claims of the plaintiff. Such quasi-contracts could also acquire a form other than a pseudo-debt, in particular when fictitious allegations of property takings were at stake: in that respect, even though the final purpose was identical—to transfer property or validate property rights—the litigation might not have been framed as a debt-claim, but as a taking and its restitution to the plaintiff (C 5-2). The main point, however, is that all those procedural fictions, construed either around a pseudo-debt or a pseudo-taking, shared the same legal foundations, namely they constructed quasi-contracts that would hardly fit within the classical formula of offer and acceptance, and hence had to be framed as a fictitious litigation. The difficult question (which I will address later) then becomes in knowing whether quasi-contracts were meant to limit the economic damages of an inefficient law of contract, and thus assume that their main purpose was to implement more efficient policies, close in some respects to what we identify today as "free contracts," or were simply minor adjustments that did not change much in an already arcane system.

To come back to our case, it should be noted that once the representative's right of representation (which was contractual), on the plaintiff's side, had been validated by the judge, the case then takes a different direction typical of pseudo-debt litigations: the real purpose of the litigation is finally uncovered. The plot is simple enough so as not to generate much confusion. To begin with, the original defendant Mishāqa, having served his purpose of challenging the rights of the plaintiff's representatives through a pseudo-debt, is no more in the game. Instead, several defendants have now become visible, all of them from the Dūmānī family, with some representing other family members. The plaintiff's representative claimed that the defendants owed the Shihābī Emir 87,029 piasters, which was the sum due for the delivery of 197,029 piasters worth of silk, out of which only 110,000 were paid in cash. Even though all those sums were not referred to specifically as "debts," the plaintiff's

language places them all into the defendants' *dhimma.* In fact, considering that for a product such as silk it would be hard to expect a simultaneous or quasi-simultaneous performance (unless the silk was ready for delivery at the moment of the contract), the classical contractual language of offer and acceptance would have been too risky for both parties, considering that such a contract does not take into consideration any time lag and a future obligation to perform, or a damage compensation if performance fails. Thus, had the plaintiff faced a bad harvest and failed to deliver his product, he might have been sued for pecuniary loss; similarly, the defendants might have sued the Emir for a poor-quality silk, or for a bad delivery. In either case, the point here is that a product like silk did not have the "required" contractual form that would have permitted its exchange in the framework of a contract that would have distributed a fair risk-allocation to both sides. Instead, the contracting parties either have to accept the more modest offer and acceptance contract, and then sue in the case of non-performance, or construe their original contract as a debt, which entails a future obligation to perform, so that if the other party sues, the obligation is already stated orally or on paper. Either way, however, and unless the product was delivered on time and its payment was received accordingly, then both parties will have to resettle for a quasi-contract, which was precisely what the disputants did in this case.

Even though the present document does not fully disclose the terms of the original agreement, the defendants, having acknowledged the original purchase and the remaining 87,029 piasters "still in their *dhimma,*" nevertheless claimed that "the initial sale was invalid [*fāsid*] and illegal [*ghayr ṣaḥīḥ*] in that the contract contained invalid sale stipulations [*shurūṭ fāsida li-l-bay'*], so that the total silk's price is no more than 100,000 piasters. As a result, we would like to deliver back to [the Emir] part of the produce, in the form that he wishes, either in kind or cash. We have evidence that shows that in the original contract he stipulated on us to proceed on credit [*nasī'at-an*], so that he would deliver it to us, and whatever we consume it would be [a debt] on our behalf [*fi-l-dhimam 'ala-ynā*], but he would pay for it [as advance credit]. Based on that, the Emir still owes us [*yabqa lanā ṭaraf al-amīr*] 10,000 piasters." Before we proceed any further, let us first clarify the middle part of the document. To begin with, having first acknowledged the preliminary conditions of the sale as stated by the plaintiff, the defendants then limited "the overall value of the silk to no more than 100,000 piasters." So why the discrepancy between the initial figure of 197,029 piasters and the last acknowledgment of 100,000 piasters? And how could the same party come with two different value sets? If we follow the defendants along their own line of arguments, a further claim was made regarding a stipulation in the contract, allegedly imposed by the Emir, and enforcing a sale on credit (*bay' al-nasī'at*): every quantity of silk consumed

by the defendants would become a debt to the Emir. Thus, by claiming that the Emir still owes them 10,000 piasters, the defendants probably meant that he delivered for only 100,000 piasters, while the rest was still waiting for delivery. Moreover, the assumption is that the 100,000 piasters of silk were delivered on credit, which the defendants were presumably able to pay at some unspecified point, and then, considering that both parties acknowledged an overall payment of 110,000 piasters, then the defendants must have paid an extra 10,000 piasters in lieu of which they received no silk. In other words, and ironically one should say, even though the contract allegedly stipulated a deferred payment clause, the plaintiffs paid 10,000 piasters in advance.

We still need to account for the remaining 87,029 piasters, also acknowledged by both parties. Even by the time the document reaches its end, that sum remains unaccounted for, and beyond what has already been claimed by all disputants, an aura of secrecy surrounds that mysterious amount. It should be noted that the *nasī'a* type of contract was only a variation of the more common *salam,* and that the former implied, as Schacht described it, that "A (the creditor) sells to B (the debtor) some object for the sum of capital and interest, payable at some future date, and immediately afterwards buys the same object back for the capital payable at once. This amounts to an unsecured loan; on another form of *'īna* which provides a security for the loan."[28] In other words, the whole purpose of the transaction would have been to give a loan of 110,000 piasters to the Dūmānīs, with an 80 percent interest amounting to 87,029 piasters, for a total of 197,029 piasters. The loan itself, whose value was 110,000 piasters, was delivered first in kind as silk and then in cash for every quantity that the Dūmānīs consumed individually. (We're assuming that the silk was in effect delivered at some unspecified point, and that the Dūmānīs then received their cash-loan of 110,000 piasters gradually rather than *in toto;* the latter possibility would imply that the whole silk détour was fictitious—a procedure to secure the full loan—while delivery assumes that the Dūmānīs received their cash-loan only gradually, either by selling the silk, or if they consumed it themselves, the Emir would pay cash for it.) But apparently the Emir limited his cash to only 100,000 piasters, hence the defendants' allegation that the silk was not worth more than that amount: they probably did receive 110,000 piasters worth of silk, but the Emir was allegedly 10,000 piasters short in cash. But, in any case, the reimbursement of the 110,000 piasters seems to have been completed, and what the plaintiff is now requesting is the interest *per se* amounting to 87,029 piasters.

Because such contractual loans were only a short distance from *ribā,* the document totally avoids the fact that the case was nothing but lending money

28. Schacht, *Introduction,* 153.

with interest. In fact, not only the 87,029 piasters-as-interest remains uncertain and the text's biggest secret, but even the date and modalities of the original contract remain unknown, except for the sketchy details provided by the defendants on the *nasī'a* loan, and to which they refer very vaguely as a "debt." Moreover, and still from the defendants' perspective, the original contract was a *bay' fāsid,* whose translation as "voidable" only partially points to its illegal nature.[29] The Ḥanafī notion of *fasād* differs between the *'ibādāt* and *mu'āmalāt* (while they tend to be identical in the other schools): in the former, each *fāsid* is also *bāṭil,* or invalid, while in transactions, *fasād* is a practice legal in its essence (*aṣl*) but not necessarily in the circumstances and stipulations of the transaction (*waṣf*); by contrast, *bāṭil* is a practice illegal in both its essence and stipulations.[30] In other words, the nature of the transaction—a credit loan—is legal, but not the modalities of the contract *per se* (e.g., a high interest rate that would classify the contract as *ribā*). So, a "voidable" contract that is *fāsid,* being in essence legal, could have its illegal modalities revised by a court so as to make them legal. And that was precisely what the court was doing here: construing the stipulations of a voidable contract.

Table 3-1
Arguments in the silk-loan to the Dūmānīs (C 3-1)

In the original contract, for which no date and no document have been provided, and which has been acknowledged by both parties, the Emir sells silk for the Dūmānīs for a total of 197,029 piasters.	197,029 piasters.
Amount paid by the defendants and acknowledged by the plaintiff.	110,000 piasters.
Amount claimed by the plaintiff and acknowledged by the defendants.	87,029 piasters.
Defendants claimed that the plaintiff imposed on them a voidable contract, or a "sale on credit." They thus received 100,000 piasters worth of silk, which they've fully refunded, and claim that the Emir owes them 10,000 piasters more.	100,000 piasters sale-on-credit.
Defendants claimed that since the 110,000 piasters worth of silk were supposed to be covered fully in cash by the Emir—the essence of the sale-on-credit contract—he nevertheless fell short by 10,000 piasters.	10,000 piasters paid to the Emir, but the latter failed to deliver the required quantity of silk.

Table 3-1: 1/2

29. Schacht, *Introduction,* 121: "The distinction between *fāsid* and *bāṭil,* which is not recognized to the same extent, or not at all, by the other [non-Ḥanafī] schools of Islamic law, is often not clearly made; the idea of *fāsid* comes near to that of "voidable," though it is not identical with it, and *fāsid* contracts, even if they are not voided, sometimes have only restricted legal effects."

30. Muḥammad Rawwās Qala'hjī, *Mu'jam lughat al-fuqahā'* (Beirut: Dār al-Nafā'is, 1996), 314.

Defendants thus received an equivalent of cash of 100,000 piasters, which is the "real" value of the silk, save the 80 percent interest. The assumption is—and that was never clearly stated as such in the document—the Dūmānīs fully refunded their "debt" of 110,000 piasters which they owed to the Emir, and which constitutes the "real" value of the silk.	
Apparently—even though the document remains silent on the issue—the defendants stopped payment for the remaining 87,029 piasters—representing the 80 percent interest—either because the Emir failed to meet his initial promises, or because they were short of cash themselves, hence the litigation.	87,029 piasters unaccounted for.

Table 3-1: 2/2

Commentary: The difficulty in reading such cases stems from the fact that the original "debt" was concealed as a silk-loan, and hence the interest upon payment of the full amount remains concealed too. The only revelation came from the defendants when they acknowledged a *nasī'a* form of contractual settlement (and hence was "voidable" from their perspective), which for our purposes serves as the key through which the case ought to be read. The conclusion points to a re-settlement is which the "interest" was renegotiated in favor of the defendants.

But, besides the original acknowledgment (*iqrār*) of the 197,029 piasters, which constituted the totality of the transaction, and the 87,029 piasters that were still due, no evidence was ever furnished as to the modalities of the original contract, or the specific clauses of the *nasī'a* loan, to the point that the whole interest-loan contract, which was the case's dirty little secret, was taboo. But the plaintiff's representative, having denied all his opponents' allegations regarding the credit-loan contract and its voidableness, requested evidence from the defendants on the basis that "personal evidence takes precedence over genuine evidence [*bayyinat al-fard muqaddama 'ala bayyinat al-ṣiḥḥa*]." I'm uncertain as to the difference between the two types of evidence and what each one individually means, but my guess is that evidence brought through witnessing is more conclusive than one that attempts to prove the soundness of a contract by other means.

In any case, there will be no evidence, and, instead, the disputants will opt for a peaceful settlement: "the dispute has taken a long enough time, and attempts were made to reconcile them, so the plaintiff's representative has settled [*ṣālaḥa*] with his opponents for the sum of 30,000 piasters, a proposal accepted by the defendants." The modalities of the payment are then explicated in the last section of the document. In reality, it will not be a direct cash payment, but a "sale" of few village lands with mulberry plantations (which, in turn, were subject to a prior purchase by the defendants on April 1846). It remains unclear, however, whether the "sale" simply meant "giving" an equivalent of landed properties to the Emir, or whether it implied a "real"

sale, meaning that the Emir effectively paid for the properties. But the amount of money, referred to as a "settlement compensation [*badal ṣulḥ*]," was mostly covered through the landed properties, with the exception of a tiny fraction of the amount—2,360 silver coins—which the plaintiff's representative acknowledged receiving from the defendants. It does seem then that the Emir was given the properties as trade-off, and that the minimal cash sum, which he also received, was probably added to clearly indicate that the "settlement compensation" went from defendants to plaintiff.

To recapitulate, and assuming that our interpretation is correct, there was an undisclosed credit-loan contract that the defendants accepted on the basis of an 80 percent interest. But either because the plaintiff failed to deliver the complete cash-sum, or due to the defendants' inability to fulfill their promise, the two parties decided to settle peacefully in court for less than the amount that was originally due as "debt," which implied a de facto reduction of the interest to 27 or 30 percent (depending on whether the value of the silk was 100,000 or 110,000 piasters).

We're in the 1840s, an intensive reform period, and yet there was no indication that the credit-loan system was getting any better. The failure to rationalize the debt system is one such poorly studied phenomenon in the economic history of Greater Syria, and even though, as we shall see later, attempts were made to impose a common interest-rate plan (see Chapter 10 *infra*). Systematization failed for a number of reasons, a mixture of socio-economic and legal factors, and which regrettably we'll address only in respect to their legal relevance. To begin with, in the absence of banking institutions, loans-with-interest were only granted by individuals, and, as the above case shows, such loans were contracted from individual to individual and court disputes were litigated on that basis. Traditionally moneylenders were wealthy Jews from the city of Damascus, who financed some of the well-to-do peasantry in the surrounding countryside, but soon (the date remains uncertain) they were to be joined by Muslims from the *a'yān* class. In Mount Lebanon loans were mostly secured by the upperclass families, who, unlike their counterparts in Greater Syria, had much closer links with their peasantry, and hence granted them loans with interest. Because such practices were often associated with *ribā,* in particular when the interest was "over the limit" (which was rarely, if at all, ever determined), their related court disputes were rarely formulated as loans, or debts fulfilled upon payment of the capital and interest, but often as contracts that entailed the selling of a commodity in lieu of a loan, and where the "interest" was concealed in the commodity's "price." As our case here shows, it is even uncertain whether the commodity was effectively delivered, and such cases were typically constructed so as to wrestle with the taboo issue of an interest imposed upon a loan.

Thus, while attempting to avoid all kinds of legal and moral limitations, loans were gradually construed on the basis of an early credit for a yet to be delivered commodity. By far, the most common type was the *salam,* a contract for delivery with prepayment, while the *istiṣnā',* which entailed an advance financing of the manufacturer, was only a variation to the more common *salam.* Both, however, were *de facto* approved by the fiqh—as customary practices whose annulment would have caused more damage than justice.[31] It was therefore that *de facto* self-imposed legalization of many customary practices could shed some light on the nature of the language of the sharī'a courts whenever a loan was at the root of the dispute. To begin with, if the loan with interest remained the non-told secret, the contract had to be formulated as a commodity sale (or a "double sale"[32]) whose "price" the buyer was unable to reimburse either partially or totally; the "price" in turn was above the commodity's street price as it covered the interest for the loan. The contract was thus formulated as a debt from buyer to seller, and because of its inherently "incorrect" but not illegal nature, it could be reformulated in court, whenever buyer or seller decided to sue, and its modalities reworked out. In fact, such contracts could be revised in court as "defective," and, considering that Ḥanafism carefully distinguished the *bāṭil* from the *fāsid,* and established a separation between the *aṣl* and *waṣf,* the modalities of the contract could thus legally be reformulated, assuming, of course, that one of the contracting parties would sue. The Dūmānī case, ending as it did with a peaceful settlement involving property transfers in lieu of a cash sum, and which in turn represented the actual interest for a (pseudo?) silk-loan, is an example of a loan contract that went awry, and whose stipulations had to be reformulated in court. Thus, even though the *nasī'a* contracts were rare to appear in court, they nevertheless were only a variation from both *salam* and *istiṣnā'* in that they all skillfully attempted to bypass the limitations of the offer and acceptance contract, and all attempted to transfer capital that was needed for investment. In effect, and considering other contractual settlements we are discussing in this chapter, there are several indications of accumulated capital in the hands of merchants, landowners, professional moneylenders, and *a'yān* families, badly in need of a viable source of investment. The accumulation of capital had reached a level for which new outlets were needed, and considering the importance of agriculture, both the acquisition of lands and loans to the peasantry were viable alternatives to dormant capitals. Both, however, represented real challenges in that neither the acquisition of lands nor credit loans were openly instituted

31. See Chapter 1 *supra.*

32. *Bay'atān fi bay'a:* a group of devices for evading the prohibition of interest.

practices that could have been legally protected. Instead, as many of our cases show, such practices had to go through a tortuous legal path, one where the acquisition of property had first to challenge an illegal taking, and where a credit loan had to go through a pseudo-purchase of a commodity, and where debts became procedural fictions in order to create obligations. Such détours, however, would have been superfluous had the legal system run efficiently in the first place, but whether they succeeded in creating an efficiency of their own is a different story altogether. In any case, the wave of westernization that struck the judiciary in the second half of the nineteenth century is definitely not a positive sign that things were running smoothly in the courts. Ḥanafī practice, with all the patches and détours it assimilated over the centuries, became inefficient in a period where change acquired a more rapid pace, while the pro-western set of codes were only a safeguard for a better accumulation and circulation of capital. Thus, in this respect, the Commercial Code of 1850 had already anticipated the movement in the forthcoming decades that money lending will assume.

What an economics of contracts implies

What should be the starting point, from the point of view of Ḥanafism, of the classical categories of "political economy"—understood as the discursive principles that regulate "economic" life—even though in most societies the "economic" does not differentiate itself from the political, social, and religious: in other words, is it possible to analyze property, contract, tort, and crime, in association with a set of "economic" values? Interestingly, in some of the most influential works in the history of Western political economy, the evolution of the Archimedean "starting point" is quite revealing. Adam Smith devotes the first chapter of *The Wealth of Nations* to the "division of labor": labor becomes the primary and most essential category in eighteenth-century political economic thought—not only the source of all wealth, but more importantly, the source of all value; in other words, a commodity is valued in terms of the quantum of labor invested in it. Thus, commodities, even though of different substances and uses, are reduced to one common denominator: labor. The important point here is that *any* thing could become a commodity as long as it is valued in terms of labor: for example, gold and silver—and money in general—are also commodities, that is, they are not set apart from other substances because they are the "things" through which most commodities are effectively valued. In post-medieval economies therefore, the fiction of labor as the value of all commodities will help in according an "atomic value" to commodities that were otherwise perceived substantially

different for religious, political, or "economic" purposes. Indeed, that was the phase of the secularization—or rationalization—of political economy, namely, that a rationale exists behind the value of each commodity. Thus, the world of Adam Smith presupposes freely competing, autonomous, and non-political individuals, to which the state as a political entity gives the security they need to pursue their economic activities.

Even though Adam Smith had already laid down the three basic categories of political economy—labor, value (price), and commodities—it was David Ricardo, in his *Principles of Political Economy and Taxation,* that placed value as the centerpiece of the system. Thus, his first chapter distinguishes between "value in use" and "value in exchange," a distinction already present in the *Wealth of Nations*. Ricardo also holds to the assumption that the exchange value of commodities is based on the amount of labor invested in them, plus the profit. But the novelty here is that by placing value prior to anything else, Ricardo wanted to point to the difficulty in knowing how this "value" is determined. Contrary to his predecessor who looked upon corn or labor as more reliable standards than "variable mediums" such as gold and silver, Ricardo was suspicious of "invariable standards," corn and labor in particular, since they too are *relative* to the value of other commodities: "labour, as being the foundation of all value, and the relative quantity of labour as almost exclusively determining the relative value of commodities."[33]

Marx entitled his first chapter of *Kapital,* "Commodities." Commodities have a use and exchange values, and the latter is determined by the quantum of labor invested in the production of a commodity. Thus far, Marx is on the same footing as his two illustrious predecessors; but he will quickly challenge them as to what the "value" of a commodity really includes: the "profit" is nothing but a "surplus value" equal to an amount of labor performed by the laborer but was not paid to him. Marx will thus look at "profit" not as something *added* to the value of a commodity, but indeed as an inherent part of what made it possible. Marx will coin the term "fetishism of commodities" in a widely celebrated chapter of *Kapital,* thus pointing out that political economy could not possibly be purified of its other "non-economic" elements, such as the anthropological, metaphysical, cultural, and political. Marx's work will remain divided between a search for a mathematical logic to the most essential economic categories (surplus value, profit, and rent), on the one hand, and the political, ideological, and social implications of the system, on the other.

Today, in our post-Keynesian world, the belief that labor is the basis for evaluating the "value" of commodities has been shattered. Money, the value of all things, has become a reference on its own, different from all commodities:

33. David Ricardo, *Principles* (New York: Everyman's Library, 1973), 11.

it is neither a signifier for labor specifically, nor value-as-labor; it is simply what all commodities and things to be exchanged point to.[34] Property is anything that could be exchangeable, regardless of whether it is material or immaterial. Prices are explained by the relative scarcities of goods and services, including those of labor and capital, which in turn reflect the ratios of the marginal utilities—that is, the expected individual welfares—they yield to the consumer.[35]

In Islamic societies, since "political economy" never materialized as an autonomous discourse, the "economic" notions were to remain mostly embedded within a juridical discourse. The jurists were indeed the ones, based on the deontological nature of the enterprise of the fiqh, to create normative rules for things (commodities) to be (legally) exchanged; to attempt a definition of "value"; and create a separation between commodities that could be legally exchanged, and those whose exchange would be illegal (even though their possession and inheritance might not necessarily be illegal). Systematic treatises, outside the fiqh, on such matters were rare, and it is even harder to find a text that would be specifically devoted to a locality and time period that would show how notions such as commodity, labor, value (price), and profit have evolved. Thus, for example, Qāsimī's two-volume work on the status of the crafts in nineteenth-century Damascus, *Qāmūs al-ṣinā'āt al-Shāmiyya,* is a direct first-hand description of the status of labor and crafts in the city. But when it comes to understanding such "notions" as "labor" or "craft" or "corporation," Qāsimī's text borrows heavily from Ibn Khaldūn's *Muqaddima,* and even though Qāsimī claims to have only attempted a "summary (*talkhīṣ*)" of the well-known fourteenth-century text, his introduction to the *Qāmūs* is for the most part identical—with long passages quoted verbatim—from Ibn Khaldūn's chapter on crafts. Due to the time gap, the *Qāmūs* poses

34. See François Rachline, *Que l'argent soit. Capitalisme et alchimie de l'avenir* (Paris: Calmann-Lévy, 1993).

35. To Adam Smith the opening of the market to selfish individuals who seek to promote their own self-interests is what reduces the damages of rent and the position of monopoly. Indeed, it is that kind of open competition that is morally just because it enables the majority to pursue their own interests rather than be subjected to unjust monopolistic forces which, in the final analysis, are nothing but the old aristocratic rentiers. Schumpeter, on the other hand, saw monopoly as an essential aspect of capitalism. The entrepreneurial spirit, as he called it, would like to be rewarded for its creations and costs by assuming—at least for a while—a position of monopoly, without which the cost and pain of competitive creation would never be rewarded. The entrepreneur, however, will not be able to rest on his laurels for long, as his creation will soon be copied and routinized by others, and because of other more inventive creations on the market—a process that Schumpeter famously labeled as one of "creative destruction." Thus, for both Adam Smith and Schumpeter, capitalism implies "fairness," and if, for Weber, the capitalist ethic is one of austerity and hard work, it still remains not that far from the joyful destructive energies of Schumpeter's entrepreneurial capitalism.

similar reading problems to those we have encountered in the fiqh texts: anachronism—that is, the difficulty in relating a particular discourse to a specific time period.

Qāsimī's discourse—and indirectly that of Ibn Khaldūn upon which it heavily borrows—on livelihood, subsistence, gain, and profit, is based on the idea of the "original" human being confronting the forces of nature in order to assure his daily subsistence: "You should know that man lacks by his own nature [*bi-l-ṭab'*] a way to assure his livelihood when moving from infancy to adulthood. Once he matures, and overcomes the weak phase in himself, he seeks the acquisition of revenues [*iqtinā' al-makāsib;* s. *kasb:* gain, profit, revenue]. Then this acquired thing [*al-muqtana*], once it turns out to be useful for man, and bears its fruits on his spending, interests, and needs, is then called livelihood [*rizq:* subsistence, means of living, wealth]."[36] He then adds, between a ḥadīth quoted from a Qur'anic verse, that "gain [*kasb*] implies attempting to acquire things, and its purpose is collecting. Labor [*'amal*] turns out therefore a necessity for the sake of subsistence [*rizq*]." The search for subsistence is known as *ma'āsh,* which in itself is another term for *rizq,* that is, livelihood. Obviously, there are several means for livelihood. The most basic are the ones connected to man's most basic needs: food and shelter. Qāsimī describes in a summary way those basic needs (acquisition of animals and plants) before moving to the subject of his book: crafts as a way to make profit (*al-kasb mina-al-ṣanā'i'*). The two chapters on "gain (*kasb*)" abound in Qur'anic and ḥadīth references, but there is little to explain what "gain" and "profit" are in the context of a *productive* cycle. What Qāsimī does, however, is to conclude with some moral precepts: that commerce (*tijāra*) is dispraised (*madhmūm*) whenever it becomes a tool to "keep an excess of one's needs," and that it is better to die without being a merchant or a traitor.[37] Moreover, the pursuance of gain could be left altogether by those involved in sufism, or in discovering the "inner self (*bāṭin*)," or those involved in the "science of the external (*'ilm al-ẓāhir*)," such as the muftī or the interpreters of the scriptures; and finally for the sultan and the judge.

Qāsimī's discourse looked upon basic "economic" categories, such as livelihood, subsistence, wealth, gain, profit, and trade, as part of a natural

36. Muḥammad Sa'īd al-Qāsimī, *Qāmūs al-ṣinā'āt al-Shāmiyya* (Paris: Mouton & Co., 1960), 1:7. A Similar passage from Ibn Khaldūn's *Muqaddima* reads as follows in the Franz Rosenthal translation (Princeton University Press, 1967), 297: "Man, by nature, needs something to feed him and to provide for him in all the conditions and stages of his life, from the time of his early growth to his maturity and on to his old age. God created everything in the world for man and gave it to him, as indicated in several verses of the Qur'ān. Man's hand stretches out over the whole world and all that is in it, since God made man His representative on earth."

37. Qāsimī, *Qāmūs,* 1:16.

cycle defined primarily in terms of "basic human needs." Such "needs," in turn, are delimited by the scriptures: thus, the right of subsistence (that is, finding and acquiring the appropriate things in nature: animals, plants, etc.) and the right of profit are both scripturally protected. "Gain," defined as the accumulation of wealth (*tharwa*), becomes a natural process that in itself does not pose a problem—at least until no "excess (*ziyāda*)" is visible: but even in this case, the excess is a moral issue, and it is left to a person's own self-esteem to determine what to keep of his accumulated wealth and what to give as charity. In short, this type of discourse—which is nothing specific to the nineteenth century or the Ottoman period for that matter—does not articulate itself around a *socially created cycle of production.* Instead, by naturalizing—and legitimizing through the scriptures—every aspect of the process, the main productive elements fail to come together in a historically coherent whole. Interestingly, the discourse of the fiqh, even though much more provocative and detailed when it comes to the basic categories of "livelihood," is as abstract and arcane as Qāsimī's. Thus, despite its more concrete legal side, the fiqh literature also fails to connect its discourse(s) with a tangible productive cycle.

In Islamic societies, the basic categories of "political economy" were integrated within the deontological normative structures of the fiqh literature. This is because law, in the strict sense of the term, is never differentiated from the other spheres of existence, and the domain of sharī'a law ultimately was vast enough to include a broad set of opinions from the *'ibādāt* to the *mu'āmalāt* and punishments. But because "political economy" did not differentiate into an autonomous discourse of its own, one wonders whether it is possible to attribute anything "economic" to the fiqh discourse in general. First, such a discourse neither structures itself on notions of production nor labor for that matter (and hence does not *explicitly* relate to notions of wages and profit either). Second, because a *specific* reference to any socio-economic reality is by definition absent, the "unity" of the discourse is based on the coherence of the tradition (see Chapters 1 & 2 *supra*). This makes it difficult to pin down the fiqh's discourse in relation to a "nineteenth-century" socio-economic life. Indeed, the whole purpose of fictional discourses is their ahistorical and moral character. This suggests that there was no legal system to underpin an invisible-hand "economic" sphere; rather, the legal system *attempted* to construe moral and religious values for the "economic" with the implicit *assumption* that such values were by and large followed. But the nineteenth century was the period—in particular during the Tanẓīmāt—in which sharī'a law lost a great deal of its jurisdiction, to the point that by the end of the century the sharī'a courts were left to adjudicate only matters of personal status and the like. The implication here is that sharī'a law was not concerned in constructing a

discourse aimed towards a "socio-economic sphere." Such a step would have required a complete epistemological and cognitive shift that would have made no sense within the *épistémè* of the fiqh.

While assuming a de facto "coherence" to the "socio-economic" lifeworld, contemporary Ottoman historiography created a discourse, based on the "factual" elements brought up from documents, which construes the societal from elements that lie "outside" those same documents. Thus, historians of the empire created a "socio-economic reality" (tainted with a blend of political economy) without even asking whether a "socio-economic" discursive level did exist in the first place. But what might very inadequately be labeled a "socio-economic discourse" was not a sphere (or discipline) on its own (as was the case with Adam Smith and David Ricardo). Instead, the domain known as "pecuniary transactions (*muʿāmalāt*)" was one of the four domains that constituted the bulk of the fiqh literature, together with the "religious rituals (*ʿibādāt*)," marriage and divorce (personal status), and punishments (*ḥudūd*). The question should therefore be posed as to whether it is legitimate to construct a historiographical enquiry that bypasses the discursive complexities of the jurists (and others as well) and naïvely assumes that the economic is a level with its own rules of coherence. A critical Ottoman historiography should abandon pure "economic relations" and instead concentrate principally on culture, discourse, text, and ideology that construct (shape, structure) "economic relations," among others. But even within this new approach, the term "economic" should be viewed very cautiously: 1) what we shall refer to very vaguely, and for lack of a better terminology, as "economic relations"—that is, anything related to such things as commodities, currencies, exchange, value and price—finds its discursive normative values primarily within the domain of the fiqh, and as part of a discourse that is neither constructed around the notions of production nor capital accumulation; 2) the domain of the fiqh specific to "pecuniary transactions (*muʿāmalāt*)" needs to be constructed in its totality, that is, primarily as a religious, moral, and legal discourse. As to "economic relations," as textualized within the domain of the fiqh, they should find their operative value within the broader normative rules of the *ʿibādāt.*

Such a method of analysis should even concentrate on the most obvious: for example, contracts of sale, in addition to tenancy contracts, made up on their own, in Greater Syria, at least half of all the recorded cases in a sharīʿa court. Yet, despite their importance, they either have been neglected as *contracts,* or worse, have been quantified and placed in abstract statistical series for the sole purpose of creating a "social history" out of them. The same applies to other commonly identified sharīʿa courts documents: successions (*tarikāt*) and sharecropping contracts (such as the *musāqāt, muzāraʿa, mashadd maskeh*), among others.

A typical contract of sale

Contracts of sale and tenancy were the most numerous, and usually the shortest due to their simple and straightforward form. Only a few lines were needed to describe that a transaction took place between the two identified parties, the nature of the transaction (buying, selling, leasing, etc.), the location of the object of the contract, the sum to be paid, specific conditions (if any), and finally, the date and witnesses, if any. Nothing is more simple in appearance than contracts of this kind; yet, their simplicity hides complex notions of contract, offer and demand, property, price and value.

> **[C 3-2]** The woman, Ruqiyya bt. Qāsim al-Ḥajjār, purchased [a home] with her own money from her husband, Ḥusayn b. Muḥammad al-Jawaharī. He willingly and consciously sold her, without duress, what was in his legal possession, based on the document in his possession, drafted in the court's majlis by Ḥāfiẓ ʿAbdullah Efendi, dated end of Jumāda II 1215 [October 1800], all the house located inside Damascus in maḥallat al-Jūrah, zuqāq al-Mīḍah. It contains habitable spaces [*masākin*], proceeds [*manāfiʿ*], and legal rights [*ḥuqūq sharʿiyya*]. It is surrounded south by the road and the gate [of the house], east by the house of Munajjid, and north and west by waqf al-Jazmā and the wall of Damascus. [The transaction] was legally completed, with full knowledge of the two parties, in terms of a legal buying and selling, that included an offer and an acceptance [*ījāb wa-qabūl*], a taking and turning over [*tasallum wa-l-taslīm*], and this, after a professional evaluation in order to avoid any injustice, for a sum of 300 piasters in current silver that the seller legally received from the buyer [...]. [The transaction] was certified [to the judge] by the testimonies of witnesses whose statements were accepted as legal. [...][38]

Nothing was simpler than *bona fide* contracts of sale, and their corollary, tenancy contracts, both of which constituted the bulk of the sharīʿa courts records. Their repetitive and purely ritualistic nature does suggest that the process of property exchange, once the stage of offer and acceptance was completed, was straightforward. What needed to be legally performed was to transcribe in writing—even though an *orally* completed transaction would have been as valid—in the presence of a judge, what had been agreed upon orally. The exchange in the above case might have well been a simple title transfer, where the declared amount of 300 piasters only played a nominal role. Thus, in spite of the fact that the husband had the possibility of transferring his property to his wife as a "donation" (*hiba*), a regular act of sale was (and still is) the preferred way to go simply because the transferor would be unable to revoke that easily.

38. Damascus 251/46/77/19 Muḥarram 1218 (May 11, 1803).

But what is at stake here is the status of all those urban and rural properties, and the way they were acquired, possessed, transmitted, and inherited. First, the status of property in general remained ambiguous under the Ottomans. Not only was the borderline between state-owned property (*mīrī*) and *milk* confusing, but waqfs, by their sheer bulk, added to the uncertainty. Second, because the great majority of rural properties was either mīrī or waqf, ownership of the proceeds (*ḥaqq tamlīk al-manfa'a*), in its numerous forms, became a common practice. This has rendered the notion of "private property" even more complex. Third, some sharī'a court records that manifest an *apparent* litigation turn out upon closer examination fictitious cases where large property transfers took place between members of the same family (usually along generational lines). Some of those cases *might* have involved a change of status: from mīrī to milk, or waqf to milk, or mīrī to waqf. The point here is that it is largely debatable whether private property became—even in a limited way—freely exchangeable: the case above, picked up at random among thousands of others, represents a transaction between husband and wife in which the husband's owned property was purchased less than three years prior to the new transaction. This *might* suggest a relocation of the family property rather than a *bona fide* sale.

Finally, the simplicity of the *written* document hides how much notions such as offer and acceptance and price evaluation (as *qīma* and *thaman*) have preoccupied jurists for centuries and tied down such "economic" notions to a legal framework whose main purpose was not necessarily economic. Furthermore, besides the fact that "price evaluation" does not in itself constitute the telos of a transaction, offer and affirmation are, according to the fiqh manuals (a principle that the Majalla clearly reiterates), *oral strategies of bargaining* that the written document cannot possibly bring forth to light. A careful examination of the fiqh texts, therefore, could shed some light on the epistemological and cognitive aspects of the court documents-as-texts, which methodologically should imply the contextualization of documents by bringing forth a level of economic anthropology to all such texts.

A general theory of contracts?

The material on value and price, commodities, money, and labor is found primarily in the various "Kitāb al-Buyū'" (Book of Selling) of the fiqh treatises. The location, however, of the Buyū' chapters is not that obvious. In Ibn 'Ābidīn's *Radd,* the "Kitāb al-Buyū'" is situated in the fourth volume of the treatise (that is, right in the middle), after the sections (*bāb*s) on taxation

(the *'ushr* and *kharāj,* which we will discuss later),[39] and after such chapters as punishment, waqf, and association (*sharika*). Even though, logically speaking, the Buyū' chapter should introduce all the *mu'āmalāt* themes as a whole (including the *ujra*), it remains uncertain why such a more logical alternative has never been opted. But the real problem, however, might be less organizational than conceptual. In fact, Ḥanafī treatises typically lack a general chapter on "contracts and obligations (*'uqūd wa-l-mūjibāt*)," and, instead, the material on contracts remains scattered between the *buyū'* and *ijāra* sections, in addition to related themes on legal or illegal gain, profit, and partnerships such as the *murābaḥa* and the *muḍāraba.* In effect, Ḥanafī treatises typically avoid a general concept of "contract" and make up for such a shortcoming by multiplying "examples" and "cases." With that failure in mind, Chafik Chehata was among the first to bring forth a "*théorie générale de l'obligation*" that bypasses and explains the never-ending "examples" and "cases" of the fiqh manuals.[40] Chehata claims to have followed an "objective method" based on "the case": considering that Islamic law is "essentially empirical," that is, based on "cases" rather than "concepts," one must "come to terms with the solutions that Islamic law gives to cases (*il faut s'attaquer aux solutions qu'il donne aux cas*)."[41] This means, above all, that one must "eliminate all theoretical explications provided by the authors—even the classics." In fact, the jurists' explanations to a case, maintains Chehata, are always provided on a de facto basis (*après coup*). Each case is usually followed by an explanation—or an attempt to *legitimize* a given opinion—and explanations can even add up for a single case; but, in the absence of a "general theory," explanations do no more than add up exactly like the cases they are supposed to explain and legitimize.[42] Chehata thus embarks into an ambitious enterprise, one that, no more no less, will construct a general theory of contracts and obligations from a *modern* perspective, on the one hand, but based on an *historical* reading of the classical texts on the other.[43] Chehata thus places himself in the position of a modern jurist, one who is under pressure to create a modern "code of contracts and obligations" that is based, for the most part, on the classics. In doing so, he avoids modernist perspectives that simply copy and translate

39. See Chapter 4 *infra.*

40. Chafik Chehata, *Théorie générale de l'obligation en droit musulman hanéfite* (Paris: Éditions Sirey, 1969).

41. Chehata, *Théorie,* 43.

42. Chehata, *Théorie,* 44.

43. Another attempt in this direction, even though less systematic, is to be found in, Ṣubḥī Maḥmaṣānī, *al-Naẓariyya al-'āmma li-l-mūjibāt wa-l-'uqūd fi-l-sharī'a al-Islāmiyya* (Beirut: Dār al-'Ilm li-l-Malāyīn, 1983).

codes from western sources—beginning with the 1804 French *Code civil*—and, instead, situates his enterprise within a more logical and *conceptual rewriting* of the Islamic fiqh from a modern perspective.[44] In short, Chehata would have liked to do better precisely where the classical jurists "failed"—in providing concepts to their cases.

It is not my intention here to assess Chehata's overall method. But, needless to say, it does not fall within the credible "historical" approach attempted in this study. To begin with, I am more interested—at least at a preliminary level of reading and interpreting—in the internal logic of texts—*how* they state things rather than simply *what* they state—their articulation of ideas and concepts, their errors, silences and tensions, rather than creating any modern rules from them (even though such an enterprise is beneficial). Second, a purely modernist perspective fails to see precisely why the classical fiqh texts "failed" to be more "conceptual" and erred on a case-by-case basis. Third, a major weakness in Chehata's approach is its inability to construct a viable *history of contractual forms,* one that would detect which contracts emerged first, and which ones were deduced from them.

Interestingly, it is only in the Majalla, which is in itself an elaborate rationalization of Ḥanafī jurisprudence, and the first and last one of its kind, that the notion of *bay'* finally finds its *logical* place (obviously, the Majalla forgoes the *'ibādāt* altogether). In fact, the *bay'* contracts occupy the scene right after the introductory part comprising the one-hundred basic Ḥanafī rules (*al-qawā'id al-fiqhiyya,* based for the most part on Ibn Nujaym's *al-Ashbāh wa-l-naẓā'ir*). Thus, the Buyū' finds its logical place at the head of all the *mu'āmalāt:* the *ijāra* (rent), and *shuf'a* (pre-emption), which are the two other categories that occupy the second and third part of the Majalla; the final, and fourth part, is solely devoted to the enterprise of judging. Because of its logical and more coherent structure, I shall first observe the theme of "sale" from the Majalla's chapter, prior to moving to "Kitāb al-Buyū'" in Ibn 'Ābidīn's *Radd.* This has the advantage of following some of the main categories of political economy in their logical interconnections rather than in the more confusing order traditionally imposed by the jurists. To be sure, my enterprise is fragmentary, time-saving, and is intended to present the reader only with a partial view of contracts and obligations that is necessary for an understanding of the "cases" in this study. One should keep in mind Chehata's concern regarding the "defects" of the Majalla, which, in turn, parallel those

44. Sanhūrī, even though had a different juridical approach than Chehata, shared similar views in his *Maṣāḍir al-ḥaqq fi-l-fiqh al-islāmī.* Both, however, fall short of what would be considered an "historical" approach.

of the classical fiqh. Even though the Majalla "has accumulated definitions, it has not done much beyond transposing cases and enumerating them. No systematic effort has been attempted."[45] But then a question begs itself: What are the implications of such a failure?

The Majalla's chapter on "sales" is divided into seven sections (*abwāb*) and an introduction. What brings together buying and selling and contracts and obligations is that notion of *ījāb,* whose meaning the Majalla identifies with *ithbāt,* that is, affirmation (in the sense of demonstrating a willingness to buy or sell). Schacht translates *ījāb* as an "offer (as a constitutive element of a contract)."[46] Article 101 defines *ījāb* as "the first utterance [*kalām*] emanating [*yaṣdur*] from one of the two contractors [*'āqidayn,* that is, either the buyer or the seller] for the purpose of establishing a capacity to dispose [*taṣarruf*], and accordingly, disposition is guaranteed and established [*wa bi-hi yūjab wa yuthbat al-taṣarruf*]." "Offer" is therefore the *first* and most fundamental move towards establishing a contract: it is indeed a *first oral step* between buyer and seller (or landowner and tenant, etc.)—and the offer/affirmation could be triggered from either side—that in itself legally establishes an *interest* in a contract from at least one party. There is a contract, according to the following article 102, only when an acceptance (*qabūl:* consensual agreement) *follows* the proposal/offer of the other party. It is therefore the *second* step that establishes the contract as such: the latter confirms the right of disposition (*taṣarruf*). The Majalla has therefore imposed a prerequisite for each contract: an offer must come *first* in the form of an *utterance.* Even though the two-step formula is not always necessary—article 167 combines, for an act of purchase, offer and acceptance in a single step—the distinction was probably created as a solution to aging controversies concerning the validity of a purchase whose offer and confirmation took place simultaneously: even though the Majalla made no explicit statement on this issue, the two-step formula and the separation of each step in a different article clearly suggests that collapsing the two in a single act renders the contract invalid.[47] So why were the two steps necessary in the first place and why did the fiqh (up to the Majalla) favor a two-step procedure? Anthropologists have often noted that the gift and counter-gift strategies formulated by Marcel Mauss incorporate *time* as an essential element in an act of exchange.[48] In fact, the gift and counter-gift lose all meaning when they take place simultaneously: the counter-gift is a reaction to the gift as a provocation; it can therefore only

45. Chehata, *Théorie,* 58.

46. Schacht, *Introduction,* 22, 145.

47. Ḥaydar, *Durar,* 1:91.

48. Marcel Mauss, *The Gift* (Norton).

come after, and the lapse of time between the two is an essential aspect of the strategy deployed by the social actors. The more the time diminishes and tends towards zero (as in a derivative equation), the more the act of exchange becomes one of equality (as in a capitalist economy): I purchased this book for twenty dollars because that was the price marked on the back cover—a typical case of a simultaneous offer and confirmation, and where the importance of time is insignificant (except in assessing the amount of labor invested in a commodity). What therefore characterizes the two-step contract procedure prevalent in Ottoman societies are 1) two oral utterances, one of offer, the other of affirmation; 2) the utterances should fit within a time sequence in which affirmation could not happen simultaneously with the offer; and 3) a contract (*'aqd*) that "links (*rabṭ*)" the offer with the corresponding affirmation: *'aqd al-bay'* suggests, like *'aqd al-ḥabl* (tying the rope), a "link" between two things; but the link is twofold. Obviously, first, the contract links the buyer and seller together, but more important, it brings together offer and affirmation (article 104 describes this process as one of "gripping (*ta'alluq*)"). Thus, the end result of this process—that of linking offer with affirmation—is the exchanged object itself that should exist (*mawjūd*) and be ready for delivery (*maqdūr al-taslīm*), in addition to falling within the category of *māl mutaqawwam* with a price (*thaman*). As article 105 makes it clear, the notion of *māl* is the broadest category in any act of exchange. Broadly speaking, *māl* refers to "any" "commodity" that could be exchanged—"any" should be taken cautiously because the exchange of commodities in Islamic societies is subject to all kinds of religious, moral, and political restrictions: so in principle *any* commodity could be exchanged, but "illegal commodities" (such as wine or pig's meat) are not legally protected and, technically speaking, they fall under the category of *māl ghayr mutaqawwam*. This is why the majority of the fiqh treatises define selling as "exchanging a *māl* with another *māl* in a way that is specifically useful (*mufid*)," the *ghayr mufid* becomes then an invalid exchange. The Majalla pushes towards a more global definition, thus paving the way towards "riskier exchanges" in a period of the empire's incorporation into a world-economy: "Selling [consists] in exchanging *māl* for *māl* that could either be the outcome of a contract (*mun'aqid*) or not involving one (*ghayr mun'aqid*)" (article 105). Here *mun'aqid* refers to the actual meeting rather than to the contract *per se*. The aim here is to point to the possibility of exchange with or without contract. The "contract," defined in the previous article as that which "brings together" offer and affirmation, leaves its "effect (*athar:* trace)" both on the seller by becoming the proprietor of the "price (*thaman*)," and the buyer by becoming the proprietor of the sold object. Excluded from such contracts and not considered as acts of "selling (*bay'*)" (and its correlative "buying") are the following: 1) "rent (*ijāra*)" defined

as a "consideration (compensation for) of the proceeds (*badal manfa'a*)"; 2) marriage (*nikāḥ*) defined as "the exchange of *māl* with the female vulva (*mubādalat al-māl bi-l-buḍa'*)";[49] 3) "donation (*hiba*)"; and 4) "lending (*i'āra*)."

The key word in all these definitions is therefore *māl* as the "object" or "thing" to be exchanged: originally it is the property of the person who owns it (the seller) and becomes the property of the buyer through the two-step process of offer and acceptance (*ījāb/qabūl*).[50] "The thing as object of legal transactions, *res in commercio,*" writes Schacht, "is called *māl,* but its opposite is not simply the *res extra commercium,* but there are several graded categories."[51] In the specific context of the Majalla, the act of selling is either the outcome of contract (*mun'aqid*) or not (free sale?); and the following types of contracts are included in the first category: valid (*ṣaḥīḥ*), defective (*fāsid:* voidable), operative (*nāfidh*), and in abeyance (*mawqūf*). On the other hand, a non-contract sale (*bay' ghayr mun'aqid*) is invalid (*bāṭil:* null and void) pure and simple. It is only this last category that differentiates itself from the rest, and were it not for the religious and moral impositions that make some commodities illegal, the whole category of invalid would have been superfluous altogether. The four types of sale within the contract category are all legal and the difference between them is a question of degree and should be looked upon as opposite pairs: thus, a sale could be either valid or defective; either operative or in abeyance. Valid contracts are the most common type: whenever a commodity has passed between seller and buyer, even if no cash (or no property) was exchanged in return (in the fiqh, the category of valid applies generally to such things as rent, suretyship, transfer of debts, and donation). A defective contract is one whose commodity is legally protected (that is, falls within the broad category of *māl mutaqawwam*), but whose exchange modalities are defective: either the price or the terms of payment are unknown (*majhūl*), or the conditions of selling are inappropriate; by contrast, in an invalid contract, the substance[52] of the commodity itself is problematic (in other words, it is a *māl ghayr mutaqawwam*).

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49. Ḥanafīs conceive marriage—at least in part—as a property transaction, even though a contract of marriage is neither strictly speaking a contract of sale nor a tenancy contract. However, "by the payment of the dower (*mahr*), the husband acquires, quite literally, the ownership (*milk*) of the wife's vulva, and it is this ownership that renders sexual intercourse licit": Colin Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997), 174.

50. In modern terminology, *māl* refers more commonly to "money," that is, the *nuqūd* or *'umla*. The equivalent of *māl* in a modern context would be *sil'a,* that is, commodity as such, or each thing that could be legally exchanged.

51. Schacht, *Introduction,* 134.

52. Substance includes here the essence (*aṣl*), self (*al-dhāt*), and characteristics (*ṣifāt*): see Ḥaydar, *Durar,* 1:94.

Interestingly, Chehata, within his modernist perspective, looks at the *object* of the contract and its *exchange* as the root of any *agreement.* The "object of the obligation," as he calls it, could be either a payment in kind (*dations*), a handing over (of property) (*tradition*), or an *opus*.[53] By placing the emphasis on the exchanged object itself rather than, say, on the act, Chehata claims that this is what jurists have been doing for centuries since exchange in Islamic law is based on *equivalence:* equality is what the contracting parties should explicitly aim for. The "cause" of obligation therefore is not the contract of sale per se, but the fact that the property of a thing has been transferred to the buyer, who, in turn, paid an *equal value* to the seller. Chehata thus concludes that it is a "theory of equivalence" that haunts contracts and obligations in Islamic law and nothing else.[54] Despite the merits of such an approach, which, for one thing, explains in one stroke that equality between commodities is at the root of every contract, it leaves aside, however, the problematics of offer and acceptance in Islamic law. (Following Sanhūrī, there should be no obligation in a regular sale contract, but only in debts.) Chehata does indirectly suggest, however, that such a gesture must be superfluous since it does not provide any adequate explanation to his "*théorie de l'équivalence":* since "equality" is at the root of contracts, does it matter then *how* things are exchanged?

Interestingly, the dynamics of offer and acceptance also constitutes one of the pillars of the English law of contracts. In contrast to the French *Code civil* which favors *agreements,*[55] English common law, old and new, looks at a contract as "a promise or set of promises that the law will enforce." The notion of *promise* includes three essential conditions for a contract to be completed: 1) an offer and an acceptance; 2) a consideration; and 3) an intention to create legal relations.[56] Thus, for a legal system that lacks systematic codes and is based on precedent, the notion of "consideration" creates what is to become as "evidence" of a contract. Similarly, the Majalla, by placing forward the dynamics of *ījāb,* has established what ought to be looked upon as "evidence" for a contract. As we shall see in specific court documents, the evidentiary role of procedural fictions was crucial in expanding traditional contractual settlements beyond their limits. A contract such as the *marṣad* (or *murṣad?*),[57]

53. Chehata, *Théorie,* 63.

54. Chehata, *Théorie,* 67.

55. Article 1101 of the *Code civil* defines a contract as "*une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose.*"

56. Jean-Claude Montanier and Geoffrey Samuel, *Le contrat en droit anglais* (Grenoble: Presses Universitaires de Grenoble, 1999), 11.

57. I have chosen *marṣad* over *murṣad,* see, Muḥammad Rawwās Qala'ḥjī, *Mu'jam lughat al-fuqahā'* (Beirut: Dār al-Nafā'is, 1996), 391.

typical in many ways of the fictitious litigations that plagued the nineteenth century, and which consisted in renting a waqf property, then investing in its foundations and deducting the expenses of construction from the rent, was both a simulated tenancy contract *and* a contract of sale (because the tenant *de facto* owned the waqf's property). The point here is that if we look at Ḥanafī practice as locked into synallagmatic contracts, we will certainly fail to understand all the contractual variations whose primary purpose was precisely to bypass such limitations, while being perfectly legal, of course.

The offer and acceptance dynamics is worth following in conjunction with the practices of the sharī'a courts. To begin with, we know for certain that those courts practiced, at some level, a straightforward application of the *ījāb* doctrine (C 3-2). But those were cases where the contract was not contested, and where delivery was immediate. However, the usefulness of *ījāb* becomes obscured once uncertainty hovers over the existence of a contract, or when the modalities of the contract are contested by the opposing party, if not both; or, in the case of a breach in the contract, or non-performance, or simply a party that defaults. The point here is to see whether the *ījāb* doctrine effectively provides for any procedural framework that proves of any help, or whether it only plays a limited evidentiary role in quasi-simultaneous exchanges.

Let us come back for a moment to our earlier case, the one between the Shihābī Emir and his borrowers (C 3-1). That was a case that was allegedly based on an oral *ījāb* pact, which entailed that a certain value of silk (only the price was identified, but not the quantity) be delivered by the Emir to the Dūmānīs, but it then turned out to be a *nasī'a*-debt formula which was qualified by the defendants-debtors as legally "voidable" (since either the *'ayn* or *dayn* is delayed). So the court's ruling transformed an originally "voidable" contract into one that was "valid" with new stipulations and a happy ending for both parties. (Note that a "voidable" contract falls within the category of *mun'aqid* contract stipulation, hence since it is neither null nor void, could be the subject of a court's action.) Moreover, and even though a "delivery with prepayment" had been commonly accepted in Ottoman times under the *salam* contract, the *nasī'a,* being a much harsher and riskier loan-with-interest, never did receive the courts' benediction. With such cases, therefore, we're into a territory that traditional practice does not map well, and towards which judges could only improvise (sometimes with a muftī's help). The problem then becomes, What is it that the court construes as the "original" contract, and on what basis does it do so? It should be noted that, as is the case here, courts could enforce contractual settlements for which neither a document nor a specific date has been furnished. Such settlements were accepted either because they were acknowledged by both parties, or else evidence in the form of witnessing had been furnished. The point here is that if the courts did in fact

contribute in reworking contractual settlements, that was mostly, though not exclusively, through procedural fictions rather than, say, a set of codified rules. My assumption is that the proliferation of contractual formulas was precisely to force every possible settlement into an already acknowledgeable form, while most ground-breaking cases were the ones construed around a muftī's fatwā.[58] In effect, the courts did very little interpretation of contractual settlements, and instead implemented the already routinized (fictional) procedures.

To ascribe a role to the courts beyond the enforcement of preexisting contractual settlements would have implied that disputants would fight their case based on "implied agreements," which the courts, by "filling the gaps," would accept as quasi-contracts and proceed from there (which is the path adopted at common law). In other words, promises or engagements, inferred promises, or simple contract, all of which were left without record, witnesses, or sustainable evidence, would have to be interpreted by the courts as possible contracts where the plaintiff would request a recovery of damages for the non-performance of the defendant. But, clearly, that was not how the courts functioned, and instead, the disputants either acknowledged their contract (as in the above Beirut case), or else the plaintiff furnished evidence (a record or witnesses). For that reason alone, the impact of the *ījāb* formula remained limited as it was difficult for the courts to integrate settlements that lacked all the formal requisites. It was indeed such difficulties that were behind contractual variation, together with the association of each settlement with a specific name, both of which were devices to minimize transaction costs. In fact, an open-contract policy would have been costly in terms of negotiations, bargaining, implementation, and performance since it would have implied that the parties create their *own* agreements without any limitation as to a particular form (debt, sharecropping, donation, lease, etc.), and then assume the risk and proceed from there. That's particularly true of societies where bargaining has to cross kin relationships, socio-economic networks, and politicized bureaucracies, all of which add to the information costs (any venture outside one's "milieu" is costly in terms of information).

The Majalla goes over several other *bay'* categories that we need not consider here. For our purposes, however, it is worth noting the four different categories of the sold object (*mabī'*). The most common is obviously that of exchanging the thing with its price (*bay' al-māl bi-l-thaman*), and for that reason it is simply referred to as *bay'*; the second is that of *ṣarf,* that is, the exchange of money and precious metals for money (*bay' al-naqd bi-l-naqd*); the third is barter (*muqāyaḍa*) defined as the exchange of a thing (*'ayn*) with

58. See Chapter 7 *infra,* and more specifically C 7-2, 8-2, 11-7 & 11-8.

another thing, or in other words, it is the exchange of a *māl* with another *māl* that excludes the use of the "two currencies (*al-naqdayn:* gold and silver)" (article 122). Finally, the *salam,* the contract for delivery with prepayment, is defined in article 123 as a type-contract in which the price is set and pre-paid (*al-thaman mu'ajjal*) but the purchased object is to be delivered on due date (*al-mabī' mu'ajjal*). As a corollary to *salam,* but specific to labor contracts in manufactures, the *istiṣnā'* is a contract of manufacture in which the artisan is given in advance the needed raw-materials (that is, is pre-paid), which in principle should have been unlawful considering that the "selling the non-existent is invalid (*bay' al-ma'dūm lā yaṣuḥḥ*),"[59] but also acknowledged (e.g., in Ibn 'Ābidīn's *Rasā'il*) as a *de facto* imposed practice by custom and habit.

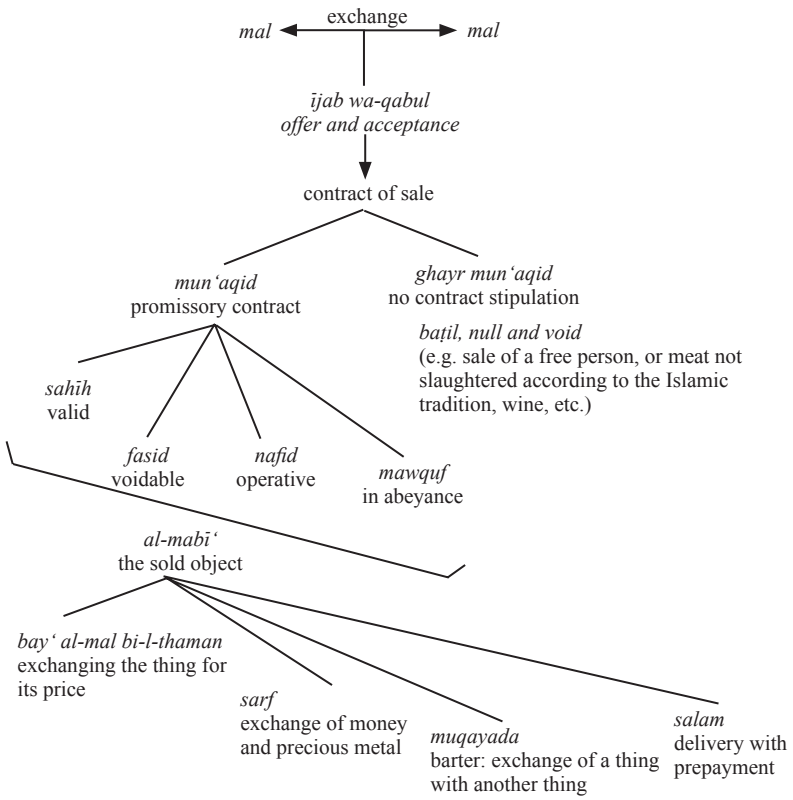

Figure 3-1. Contracts of sale.

Commentary: The point here is that as long as a contract falls under the category of *"mun'aqid"* it would still be negotiable in court even if it were "voidable" (C 3-1). Only contracts that are null and void cannot be endorsed by any court action.

59. Ibn 'Ābidīn, *Radd,* 4:517.

Article 125 of the Majalla defines "property (*milk*)" as "what is possessed by an individual whether it is *a'yān* [s. *'ayn*][60] or *manāfi'* [s. *manfa'a*]." The important point to remember concerning "property" in Islamic law is that it is never restricted to things and substances that could be acquired and possessed. In fact, the use of the thing, its proceeds (yield), and usufruct (*manfa'a*) are also considered as property. Thus, a land that belongs to one person could have its "right to use and enjoy the profits and advantages" (that is, usufruct) belonging to another. In turn, the "right to use," often referred to in the courts as *ḥaqq al-manfa'a,* could be "leased" (in terms of an *ijāra* tenancy contract) to another person. A sharī'a court document typically specifies, for *milk* properties, whether the "right to use" the property in question is also included in the purchase. This separation between the property as such and its *manfa'a* has given rise to several practices, in particular in the nineteenth century, when both waqf and mīrī (the two most predominant land categories) became economically cumbersome; the *manfa'a* also established a notion of "hire" in which the right of use of a property has become a quasi-property all by itself.

Following the definition of property, comes that of *māl:* "what the character of a human being leans towards and could be stored till needed, whether it is a movable or an immovable property." Interestingly, the clause specifying that the thing "could be stored till needed" excludes grains and other "unstable utilities (*manāfi' ghayr mustaqirra*)" that cannot be adequately stored.[61] Thus, the majority of things (or substances), with few exceptions, have a *māliyya,* that is, could be acquired, stored, and become the private property of an individual; but the same things are also subject to a *taqwīm,* that is, an "evaluation" or "assessment." The evaluation is part of the process that assesses commodities according to religious, moral, and other ideological biases. It is in fact inconceivable that *any* commodity will end up evaluated and exchanged in the same way. Article 127 of the Majalla notes that there are two meanings for the "assessed commodity (*māl mutaqawwam*)": the first is imposed by sharī'a law and discredits specific commodities from exchange (wine, or meat not slaughtered according to Islamic customs, etc.); such commodities, even though *māl* in the strict sense of the term, are "not favorably assessed (*ghayr mutaqawwam*)" by sharī'a law; their status becomes therefore that of commodities that are either illegal if exchanged, or if an exchange takes place,

60. According to article 159, *'ayn* originates in the "specified thing (*al-shay' al-mu'ayyan al-mushakhkhaṣ*)" and denotes anything from a home, horse, chair, barley, wheat, or money. Thus, despite the fact that *'ayn* is synonymous with *māl* in designating any possible thing or substance, *māl* should be looked upon more as a "thing-for-exchange," that is, ready to be sold and bought: this "readiness" determines whether the purchase of the object is legal or not (*mutaqawwam/ghayr mutaqawwam*).

61. Ḥaydar, *Durar,* 1:100.

the law cannot protect its validity (some jurists do not consider such "illegal" things as *māl* in the first place): thus, either commodities are favorably assessed for exchange and are considered *māl,* or else they do not fall within these categories altogether. As noted earlier, the case of wheat shows that, even though it is perfectly exchangeable from a religious—or ideological—point of view, it is nonetheless not labeled as *māl* because its storage conditions are problematic. The same applies to animals that die a natural death and are not ritually slaughtered.[62]

The second meaning of "assessed commodity" is an outcome of customary practices: that of an "acquired object (*al-māl al-muḥraz*)." For example, fish in the sea are categorized as *māl ghayr mutaqawwam,* and only the act of fishing transforms them into a commodity ready for exchange. Article 363 explicitly states that the selling of a "non-assessed commodity" is null and void. The outcome of such distinctions is that Islamic law did not create a general abstract category of "the exchangeable commodity" and did not submit every commodity produced on the market to a level of abstract coherence. It is true, however, that the category of *māl mutaqawwam* meets, at least partially, this criteria; but even within this category, any object that could not be stored (*iddikhār*) "until it is needed" has to be excluded (e.g., wheat; or grains in general?). Also excluded are the free person and dead meat (from animals not ritually slaughtered). The idea here is to exclude what "an individual character" cannot possibly like. But even when a thing is accepted as *māl,* it nonetheless runs the risk of the "evaluation" process that classifies few things as not ready for exchange. Thus, the logic here follows a three-step process: 1) Is the thing a *māl* or *ghayr māl?;* 2) if it is categorized as *māl,* is it *mutaqawwam* or *ghayr mutaqawwam?;* and finally 3) is the thing classified as *māl ghayr mutaqawwam* acquired (according to custom) or accepted as such under sharī'a law?

All these categories and sub-categories fall under the general genus of *a'yān* (s. *'ayn*). Strangely, a definition of *'ayn* comes much later (article 159): "*al-'ayn* is the specific (designated) thing that is personified (*al-shay' al-mu'ayyan al-mushakhkhaṣ*) such as a home, a horse, a chair, a pile of readily prepared wheat or money—all of which are *a'yān.*" The *a'yān,* in turn, is one of the two categories of *milk;* the other being that of *manāfi'* (proceeds and usufruct). Because the usufruct is not a tangible object but a "right to use" a property (and is itself a quasi-property), only the *a'yān* are the things that could be acquired and possessed as objects. Article 151 identifies the "*mabī'* in terms of its *'ayn* that is sold." This definition might seem superfluous in its generality: since

62. Ḥaydar, *Durar,* 1:101.

any object is a *'ayn,* therefore any sold object is a *'ayn* too—a tautological statement. In the logic of the fiqh, however, such a reminder of the obvious underscores the division within the broad category of *milk:* viz. between *a'yān* and *manāfi'*. The *manāfi',* even though strictly speaking under the category of private property, they cannot be sold and purchased under the same rules as that of commodities in general. Their status is even more ambiguous than that of *a'yān* since the *manfa'a* is by its very nature not a "thing" (or tangible object). In fact, right from the beginning of "Kitāb al-Buyū'," Ibn 'Ābidīn stipulates that the "proceeds and usufruct of a thing constitute a property but are not a thing (*al-manfa'a milk lā māl*),"[63] and "usufruct is not a thing (*al-manfa'a ghayr māl*)."[64] And since "selling is the language of exchanging a thing with another thing (*al-bay' lughat mubādalat al-māl bi-l-māl*),"[65] it follows that the usufruct of a thing could neither be sold nor exchanged.[66]

63. Ibn 'Ābidīn, *Radd,* 4:502. An alternative translation: "the proceeds and usufruct of a thing are possessed by the tenant, without being his property." Since any exchangeable object is *māl,* the latter becomes the general term for property, while *milk* is limited to the "possession" of the thing and the absolute right of its use. Hence a tenant possesses the *manfa'a* as *milk,* even though the latter is not his property (*māl*). Such a definition of property as *māl* limits it to corporeal property, thus excluding incorporeal property (e.g., debt instruments or promises to pay) and intangible property (anything that enables one to obtain from others an income in the process of buying and selling, borrowing and lending, hiring and hiring out, renting and leasing, whatever the transaction). On the notion of property as *māl,* see, Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance* (The Hague: Kluwer Law International, 1998), 94-5.

64. Ibn 'Ābidīn, *Radd,* 4:503. Or: "the usufruct is not property as such."

65. Ibn 'Ābidīn, *Radd,* 4:502.

66. As we will see later, the above statement is more confusing than it first appears: 1) Ibn 'Ābidīn includes and discusses several forms of "usufruct" such as the *klulū, kadak (gedik),* and the *mashadd maskeh,* in his chapter on the "Buyū'"; 2) These forms of "usufruct" are "on the top of the rent" and are "purchased" from one tenant to the next without the intervention of the proprietor who seems the obvious loser in all such transactions (in particular waqf properties); 3) Sharī'a court cases treat some *manāfi'* in a way very similar—if not identical—to properties in general: that is, they could be purchased, exchanged, transferred, inherited, etc.

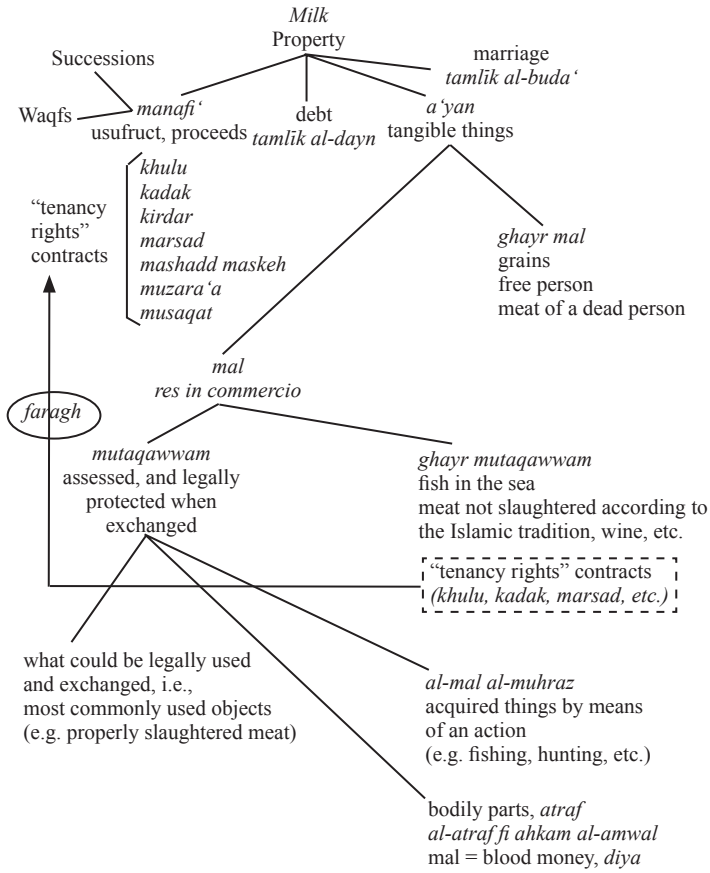

Figure 3-2. Milk subdivisions.

Commentary: Besides the big division between *a‘yān* and *manāfi‘,* it is important to see where did the “tenancy-rights” contracts fit into the picture. In fact, such contractual settlements, which were neither pure *milk* nor tenancy contracts as such, became prominant in the urban areas and were for the most part based on an “investment” from the tenant in the property which he or she did not own, thus making the latter a de facto second owner. But even though the economic “benefits” for society as a whole remain by and large questionable as such settlements tend to block tenancy rights and subject them to quasi-sale operations (obviously, it was the tenant who ended up with the greatest advantage), such practices brought tenancy rights closer to sale contracts, thus binding them by status and special settlements rather than opening them to a free competitive market. Finally, as we will see in Chapter 11, contractual settlements of a nature similar found in this chapter were also applied to homicide cases, thus making the damaged body parts, considered as *māl,* subject to a negotiation-cum-“compensation” in terms of pre-arranged settlements with the culprit or his family. Where does *money as ‘umla* fall into all this? Considered only as a “means” to “value” (*qīma*) things, it is therefore not a *‘ayn,* which therefore implies that it is not a *māl* either. So what is it exactly then? In principle, had the fiqh acknowledged the status of *‘umla* as *‘ayn* and *māl,* it would have then become like *any* other commodity—but with the very privileged status that it could be exchanged for *any*

other commodity—and hence the exchange of money for money could only be done at a price ("interest"), otherwise there would be no incentive for it. However, having not acknowledged that common *and* special status as applying to money, it does not fit, strangely enough, *anywhere* in the above chart. It was, indeed, the thing *invisible* in Ḥanafī dogma.

The following article (152) defines "price (*thaman*)" as "that which is in consideration (or counter-value) for the sold object (*badal al-mabī'*) and implies an obligation (*dhimma:* engagement, undertaking, safekeeping)."[67] Among the one-hundred "general rules" given priority in the Majalla, article eight is devoted to "liability (*dhimma*)": "In essence man is free from obligation (*al-aṣl barā'at al-dhimma*),"[68] meaning that, unless proven otherwise, a man has no obligation to anyone else. Similarly, a man is innocent of any wrongdoing unless proven otherwise. Another article (612) gives *dhimma* a meaning closer to "self (*al-dhāt*)." The point here is that the association of an act of sale with obligation and engagement points to a stronger view than normally held under classical Ḥanafism, which limits obligation to debts only. Thus, in the context of an obligation arising from a contract, *dhimma* becomes "care as a duty of conscience": in other words, the "manifest intention (*niyya*)" of both buyer and seller is the "essence (*aṣl*)" of a transaction.

Can prices be fair?

How is the "price" of an exchanged object determined? Or which elements determine the "price" of an exchange commodity? When the Majalla looks at price as the "value of a thing," it forces into it a meaning much wider than the fiqh ever dreamed of.[69] Indeed, it looks more like a common sense definition of price and value, transferred from the common to the specific. In the version proposed by Ibn 'Ābidīn, the *māl* "is what our natural disposition desires and could be stored until needed"; the *māliyya* "confirms the activity that all or some people share in acquiring things (*tamawwul*)"; the *taqawwum,* in turn, establishes what the acquisition of things is all about and legally permits the use of *some* of the acquired things (*ibāḥat al-intifā' bi-l-māl shar'-an*). Therefore, an object, such as wine, is a *māl* but without the legal prerequisites for a "usage permission (*ibāḥat intifā'*)"; on the other hand, a grain of wheat, even though

67. In another context, it also means the covenant of protection provided to the non-Muslim *dhimmī*s.

68. An alternative translation: "Freedom of indebtedness must be presumed, unless proven otherwise." The key notion here is that of *aṣl,* which implies an "original state" of nature which is the "essence" of beings.

69. Ḥaydar, *Durar,* 1:107.

its consumption is obviously legally permitted, is not a *māl* because it failed the test of *tamawwul.*[70] In fact, *selection* is what characterizes the process of *tamawwul* altogether and consists in deciding which things (commodities) are legal for acquisition and consumption and which are not. The *māl* is therefore "broader than the *mutaqawwam.*"[71] Thus far, in comparison to the Majalla, the differences seem indeed minimal: some definitions are even quoted verbatim from the *Radd* and other Ḥanafī sources. What has changed, however, is the *order* in which definitions and statements are introduced—a new order that probably conceals a different logic. The Majalla places the "Buyū'" chapter at the head of all the *mu'āmalāt,* and thus operates directly with the notions of offer and acceptance (*ījāb wa-qabūl*). In the more classical exposition adopted by Ibn 'Ābidīn (and many of his predecessors), the notions of *māl, māliyya,* and *taqawwum* come first, and the two-step process of offer and acceptance, which is introduced much later, is not even as thoroughly explained as in the Majalla. It could well be that the Majalla, in itself a rationalization of Ḥanafī contracts and drafted in such a way to make transactions between individuals and groups more transparent, naturally saw in the process of offer and confirmation, and its modalities, an evidentiary role for the newly established courts. The second half of the nineteenth century was a period of economic renewal and change, caused mainly by an aggressive capitalist European market expanding to peripheries and semi-peripheries, such as the Ottoman Empire. The notions of *māl* and its "assessment" became of secondary importance to the *transaction process* itself. The other possibility is that the Majalla was indeed looking towards are a more modern concept of *contractual liability,* so that even a regular contract of sale would now entail an obligation, which also includes, among others, exchanging currency with currency, but with no clear notion of "interest." Thus, by placing the essence of a contractual settlement in the *ījāb* formula, the act of exchange itself and its modalities become formalized. In fact, judges know all too well that even professionals fail to meet the judicial criteria for exchange, so that in the case of non-performance the court must begin with the all too obvious: Was there a "contract" in the first place, and what were its modalities? In other words, the more the law of contract is freed from specifics—and the adoption of a general formula indeed contributes in that direction—the more the emphasis is placed on "contractual liability." It all consists in being able to determine who is liable in the case of non-performance in particular, if the settlement was neither based on a record nor an a formal agreement. Thus, a court may refuse to admit any liability in a "contract" until

70. Ibn 'Ābidīn, *Radd,* 4:501.

71. Ibn 'Ābidīn, *Radd,* 4:501.

the formal requisites of offer and acceptance, as specified in Ḥanafī practice and the Majalla specifically, had been satisfied. We are closer, in this respect at least, to the American common law, which looks upon "consideration" as the outcome of offer and acceptance and as evidence of "bargaining," hence a "mutuality of obligation" and a liability in the case of non-performance.[72]

Once Ibn ʿĀbidīn establishes that *māl* as property is a broad category that needs an assessment on an individual basis (the *aʿyān* are even broader than the *amwāl*), he proceeds with the notion of "price (*thaman*)." There are four types of exchange: barter (*muqāyaḍa*) is defined as the exchange of a thing with another thing (*ʿayn bi-ʿayn*); money exchange (*ṣarf*) means exchanging "a price with another price (*thaman bi-thaman*)"; the contract for delivery with prepayment (*salam*) is the exchange of a price with a thing; finally, and surprisingly, the most common type of exchange, that of a thing with its price, "is not associated with a particular name (*laysa lahu ism khāṣṣ*)."[73]

The problematic notion of "price," however, is not granted much analytic attention. Not only is no effort deployed, throughout the "Buyūʿ" chapter, to come to terms with the price issue, a deliberate strategy of *detachment* is even self-imposed. Thus, a reminder comes first that "the proceeds are from the *aʿyān* and not from prices"; it follows therefore that "price is not the final target, but a means to the target"; and because of this, there is no prior condition that requires to place a price with a sold object: "with this in mind, the price has become among several conditions, having the status of the workers' equipment (*bi-manzilat ālāt al-ṣunnāʿ*)."[74] In other words, since there is no necessary association between a price and a sold object (in the sense that it *must* be priced), the price is only brought up as a contingent "stipulation (*sharṭ*)" whenever it proves necessary. Thus, a contract of sale "could break up because of the deterioration (*halāk:* destruction) of the sold object but not of its price."[75] In other words, since the purpose of a transaction is to acquire a desired object rather than its price, the deterioration of the object is enough in itself for a breach of contract; while a price does not "deteriorate" like a thing. The surprising logic here is to place the purpose/telos (*qaṣd/maqṣūd*) solely on the side of the desired object and to perceive the price as a "means (*wasīla*)": Unless we are limited to barter, isn't it obvious that the price is also a purpose for the other party, the one who sold the commodity? But the logic here is that even the seller did not perform his transaction for the sake of the price, but only to acquire something with it in the near future.

72. Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974 & 1995), 95.
73. Ibn ʿĀbidīn, *Radd,* 4:501.
74. Ibn ʿĀbidīn, *Radd,* 4:501.
75. Ibn ʿĀbidīn, *Radd,* 4:502.

To come back to our original question: How is the "value (*qīma*)" of an exchanged object determined? On what ground is a specific "price (*thaman*)" associated with an exchanged object? The Majalla claims two meanings to price (article 152). The first is that of "the value of the sold object" which is directly associated with *dhimma* ("care as a duty of conscience"); the second meaning determines the "equivalent (*badal:* consideration)," that is, "the *māl* that acts as a counter-value to the sold object (*'iwaḍ-an 'an al-mabī'*)." The "value"-as-price of the exchanged object is determined, based on the first meaning, in terms of fungibles that can be weighted (*mawzūnāt*), or measured (*mukayyilāt*), or have similar measuring units (*'adadiyyāt al-mutaqāriba*), in addition to currencies, but excluding the non-fungible *a'yān* because of the difficulty in associating them to a specific value, hence to the notion of *dhimma.* As to "consideration," it could include all of the above, in addition to "non-fungibles (*al-a'yān ghayr al-mithliyya*)," such as animals and clothes. Thus, the only category that does not fit within the two defined meanings of "price" is that of fungibles, *a'yān mithliyya.* Notice that the "value" of a commodity either has a price assessed in terms of fungibles (weights, measures and currencies), or else is bartered for another *a'yān*. The notion of "price that acts in consideration of the sold object on the basis of liability (*dhimma*)" (article 152) therefore places all emphasis on the other side of the equation: that is, on the object—whether a currency or something else—which in turn acts as an *evaluator* to commodities. Nothing has been mentioned yet on *how to evaluate the object poised for exchange;* and the only thing that has been determined thus far is the objects that could act as a general medium for exchange. The latter, in turn, poses the same problem of evaluation: how is their value and price to be determined? This question urges itself even upon currencies because whether they are based on gold or silver (or paper money for that matter), it remains to be seen on what basis the *quantities* of gold and silver in the minted coins have been valued for. In short, there seems to be thus far a missing "ground" to evaluate all legally exchanged commodities, on either side of the equation.

A beginning to an answer is not even to be expected in either of the two articles that follow. Article 153 defines the "known price (*al-thaman al-musamma*)" as the price that the contractor determines or establishes whether it is identical with "the real value (*al-qīma al-ḥaqīqiyya*)" or is superior or inferior to the latter. Article 154 for its part establishes the existence of an "average price (*thaman al-mithl*)" commonly identified as the "value" or the "real price" of the exchanged object. The difference between the two prices, however, only serves for legal purposes in determining the difference between the "real value" of the commodity and its market value. In effect, if market value *is* the price for which the commodity is purchased based

on a certain competitive advantage, the "real value" is nothing but a legal fiction that serves as "reference" to market price. For example, if a person owns a thing whose "real value" is 100 piasters and proposes it for a 100 piasters (*al-thaman al-musamma*), but ends up getting 120 piasters on the market, then the average market price is higher than what the thing is really worth. The problem, however, is how to evaluate the "real value (*qīma*)" in order to understand its legal implications. But even a closer reading of the texts, however, disappoints. The same could be said about the "value of a rent": there is also an "average (or fair) rent (*ajr al-mithl*)," which is the rent estimated by professionals (article 414), or more precisely its market price. But this does not say much on how rent in general affects or is affected by the other economic indicators such as wages and profit; while "wages (*ujra*)," in turn, were not "linked" to either rent or profit. In fact, it turns out that the Majalla, even though explicitly posing three values, is only concerned with the last—practical—one: the market value. Moral issues notwithstanding, the real concern is with the "market price": Ibn ʿĀbidīn follows Abū Yūsuf's rule that currencies should be assessed on the basis of "their value on the day when the selling took place."[76] There are no directives, however, on how to assess this "value" while positioning a commodity on the market.

The two (or three) values in assessing the *amwāl* might suggest a similarity between the "value in use" and "value in exchange" of the Physiocrats and later eighteenth- and nineteenth-centuries European economists: the "stated value" of the Muslim jurists shows a certain parallelism with the "value in use" on the ground that both seem concerned with the "real value" of the thing, that is, outside its market value; while the "average (market) price" is similar to the "value in exchange." Yet, there is nothing more radically different than these two systems in the ways they construct their perceptions of value and price, not to mention the other correlative notions of wages and profit. In fact, in the early Physiocrats' system, the first assumption is that all wealth comes from land and human labor adds to this natural wealth. There is a "value in use" as long as labor is oriented to satisfy one's own needs of subsistence (clothing, shelter, and household). The second assumption is that the value of things is linked to exchange: once a thing is ready for exchange, that is, loses its primitive function of "value in use," it becomes a "value in exchange." Both values, however, are linked, in the process of their evaluation to labor: only labor gives value to things. Finally, money—as a sign (signifier)—*represents* wealth circulating around in the form of exchangeable commodities. It took a long time—by the second half of the nineteenth century—to perceive money

76. Ibn ʿĀbidīn, *Radd,* 4:534.

as a commodity on its own, whose use generates an interest, which in turn has since then been conceptualized as the price for the use of money.[77]

The unprecedented notion that Adam Smith introduced was not his emphasis on labor, since this was already one of the Physiocrats' basic ideas, but that labor is the common *measure* of all things: it could be measured, calculated, and above all, constitutes an *invariable* measure. Ricardo will precisely question Smith's notion of labor as the yardstick for all value. For Ricardo, labor itself will gain the status of a product: it is purchased and exchanged like any other commodity, and hence subject to the same price fluctuations as other commodities. Currencies will cease to be signs representing wealth, but also, like labor, a commodity produced for exchange. Thus, even though labor retains its primacy in Ricardo's system of political economy, it ceases to be the invariable yardstick. In other words, the theory of production precedes everything else: circulation, labor, currencies, etc.[78]

The assumptions of the Muslim jurists are founded on entirely different premises. Nothing is more alien to the fiqh than production and its cycles. The whole notion of *māl* is neither articulated around labor nor production. Wealth is also perceived as natural and divine—and more concretely, in land—and what man adds to this natural wealth, through his own labor, he does to meet his subsistence. In other words, he becomes a producer of *amwāl.* Those things, however, are perceived as an "extension" to natural and divine wealth and should therefore obey the same "sanctity rules" as other natural products: hence the major concern of jurists in creating their venerable process of "assessment" and their division of *amwāl* into the two broad categories of *mutaqawwam* and *ghayr mutaqawwam.* But if the "labor theory of value" has not been successfully implemented in Islamdom, it is not solely for moral and religious reasons as is commonly assumed. Europe shared its own vindications against usury, which were eventually surpassed thanks to the early capitalism of the Italian city-states. One should therefore look at the stumbling economic conditions under the Mamlūks and Ottomans in their totality, namely by looking both at the material conditions and institutional discourses. It was, indeed, the nonexistence of an autonomous discourse on political economy,

77. Joseph A. Schumpeter, *History of Economic Analysis* (New York: Oxford University Press, 1954 & 1994), 718-19: "As soon as we realize that there is no essential difference between those forms of 'paper credit' that are used for paying and lending, and that demand, supported by 'credit,' acts upon prices as essentially the same manner as does demand supported by legal tender, we are on the way toward a serviceable theory of the credit structure and, in particular, toward the discovery of the relations between prices and interest."

78. See Michel Foucault on how nineteenth-century political economy fits within the general *épistémè* of that period, together with the natural and social sciences: *Les mots et les choses: une archéologie des sciences humaines* (Paris: Gallimard, 1966), 266-267.

one that would have tackled such venerable notions as value, money, price and interest, that eventually left the fiqh in a gray area on its own.[79]

Historians of the Ottoman Empire should therefore rethink the roots of "political economy" in terms of "values" that cannot be reduced to their prices, and whose legal variations are probably as relevant as their economic ones; or the contractual variations that push for a variety of property rights, all of which should be valued in terms of the transaction costs inherent in any bargaining process; and, finally, assess the practice of the courts and other legal instances, such as the regional councils and sultanic (bureaucratic) legislation, in their capacity to generate additional contractual settlements, so that property rights were not limited to what doctrine had stipulated.

The language of contracts

So far, we have dealt with some key "economic" categories in the following (logical) order: property, *a'yān, manāfi', amwāl,* contract, value and price. *Milk* is therefore the broadest category since it covers both "things" and their "proceeds." Some of the *a'yān* are *amwāl,* that is, things whose exchange is legally protected by means of a contract; but the "assessment" of the some *amwāl* makes them ineligible for legal contracts. The whole notion of contract is based on the initial oral pact of offer and affirmation. Both the Majalla and earlier Ḥanafī texts underscore the fundamentally oral aspect of exchange to the point that the written document, if available, becomes a derivative of the oral procedure of offer and demand. Thus, in the Majalla, the possibility of a written contract comes much later, in article 173 (seventy-two articles

79. Cf. Maxime Rodinson, *Islam et capitalisme* (Paris: Seuil, 1966), Chapter IV: "Influence de l'idéologie musulmane en général dans le domaine économique." Going through various "ideological" levels, Rodinson is unable to detect any firm reprobation of either *riba* or *gharar,* which, beginning with the scriptures, he perceives as having both been very loosely defined in the Islamic literature. Why then did loan practices not openly flourish, as they did in the Italian city-states of the Renaissance? In effect, even the Ottoman Majalla of 1877 did not carry a single item on loans with interest, and it was only a firman, dated 3 April 1887, that fixed the rate of such loans at 9 percent (p. 157). If, however, Rodinson's analysis, despite all its merits, is nonetheless not that persuasive it is probably because he limits the development of capitalism to the circulation of capital, and hence, indirectly, to the ubiquitousness of credit and loans. But if such capitalist techniques remained marginal in all the Islamic empires, including the Ottoman, in spite of all the loose legislation regarding usury, it was because there was no need for them in the first place, meaning that the productive forces in those societies did not develop to such a degree to require massive loans and credits. The "Islam and capitalism" paradigm can therefore only be tackled globally, through a synthesis that would bring together state formations with land regimes, currencies, trade, law, the role of the literati and culture.

after the one on offer): "In the same way that offer and affirmation could be orally stated, they could also be performed in writing." For his part, Ibn ʿĀbidīn states that "writing is like speech [*al-kitāba ka-l-khaṭāb*]," then quotes Sarakhsī's *Mabsūṭ:* "In the same way that a marriage contract is completed in writing, selling and other dispositions [*taṣarruf̣āt*] are also contracted in writing."[80] There is therefore clearly a primacy of the oral in these societies, a primacy probably imposed by the standing power of customary practices. A practice, even one that proves not in harmony with the precepts of the fiqh, was justifiable or excusable in light of the generally accepted standards of the community. Furthermore, the fiqh looked at custom primarily as a *linguistic dressage.* In other words, there was an explicit awareness in sharīʿa law that what it all amounted to, in the final analysis, was a linguistic habit, and what the fiqh could do, under such circumstances, was a de facto acceptance of the practice, in particular if the aim was general enough and not limited to a particular locality. Unsurprisingly, therefore, the Majalla devotes several of its "general principles" to the issue of "accepting the oral customs" (articles 36, 37, 39, 43) and to language in general (articles 3, 12, 61). Article 168 explicitly states that "offer and affirmation in [an act of] selling consists in every two utterances [*lafẓ-ayn*] uttered to conclude a sale in the custom of the town and its people [*al-balda wa-l-qawm*]." The fiqh for its part devotes a great deal of its energies in establishing protocols of oral contracts. If the buyer says: "I bought this slave of yours for a thousand dirhams," and the seller replies: "You did so"; then the buyer says: "Yes," and the seller, in turn, replies: "Give me the price": this form of oral exchange establishes to Ibn ʿĀbidīn a legally valid contract even though no written document exists.[81] But who guarantees the linguistic norm in the practice of sale? Some core passages in Ibn ʿĀbidīn's *Risāla* on custom suggest a generous attitude similar to the one in the Majalla. In fact, the Majalla radicalizes and explicitly declares what some jurists had already stated albeit confusingly: that as far as *oral* contracts are concerned, the customary practices of *every* "locality" should be accepted as valid and legal. Even though no lower limit was ever imposed as to what "locality" stands for (the linguistic connotations are even more confusing: *balad, bilād, bilādu-nā, balda, qawm, ahl,* etc.),[82] the fiqh stumbled over the issue of a general versus private custom: in principle, only a general custom should be accepted, even though there are several historical examples of "local" customs

80. Ibn ʿĀbidīn, *Radd,* 4:512.

81. Ibn ʿĀbidīn, *Radd,* 4:512.

82. See, Haim Gerber, ""Palestine" and Other Territorial Concepts in the 17th Century," *International Journal of Middle East Studies* 30, no. 4 (1998): 563-572, which discusses Khayr al-Dīn Ramlī's notion of *bilād.*

being also equally approved as norm. It is therefore safe to conclude that there was no easy solution to what the fiqh should integrate within its corpus among the numerous (linguistic) customary practices. Indeed, the fiqh was itself constructed on the principle of a "general" acceptance of the prophetic practices as more normatively valid than the other more "local" ones. The enterprise of the fiqh, in its different schools, has since then accommodated locally influential practices into the more general framework of the canon: in other words, it was attempting to accommodate the historically "local" with the canonical norms.

Ḥanafism therefore cannot but accept emerging practices, but it can only do so while attempting to impose a form on the immense number of the latter's variations: after all, such practices have no legal value in themselves unless articulated into the more general language of the fiqh. Thus, by imagining a formal dialogue between buyer and seller, Ibn ʿĀbidīn was attempting to discursively integrate and legalize a customary oral contractual form. His approach is even more evident when it comes to the "marriage contract (*kitāb al-nikāḥ*)." Conceived among Ḥanafīs as a contract in which the dower (*mahr*) is exchanged for the vulva (a process known as *tamlīk al-buḍaʿ*), the two parties have no other choice but to draft a written contract (*kitāb* does suggest a written text), but anything that precedes this event, such as prenuptial arrangements with possible legal implications, could be orally bargained for. The written document (*kitāb*) establishes the right of the bride to give her approval to the groom's offer in a majlis different from the one in which the offer was initially made. It is the written document that makes possible the transfer of the approval to another time and place: "Once she reads the letter [*kitāb*] for a second time, with his words 'I'll marry you under such and such conditions,' and she accepts [the offer] in front of witnesses, the contract is valid as if [the groom] uttered his words [in person] for a second time"; in other words, "the reading of a document has the status [*bi-manzilat*] of an offer made through a document."[83] Thus, while a customary practice remains tied up to the locality that produced it and made its existence possible, a document, in a way very much similar to a legal text, travels in time and space and achieves the status of *oral repetitiveness:* it is as if the document's "author" becomes present in different places and times.

In any case, testimonies only confirm the ownership of property, over a period of time, which in itself does not include the present. In other words, since it is impossible for any witness to prove that his party owned so and so for such a period, without any interruption and up to the present, the under-oath assertion that ownership "begins" with a specific date, and that any knowledge

83. Ibn ʿĀbidīn, *Radd,* 4:513.

of the purchase, transfer, and rights, is hence reliable, thus works under the assumption that all the latter do *prima facie* apply to the present. Hence the court has to *assume* that this ownership has been maintained and is still valid to the present—the time of the hearing. In fact, one of the "general rules" of the Majalla states that "the continuance [*baqā'*] of what has been established for a time period is legally accepted as long as there is nothing that prevents it from persevering" (article 10). In the case of properties, testimonies are always about the past (unless the witness has direct evidence that the day of the hearing his party still owns the property), and it is only through a legal technique attributed to Shāfi'ī, and similar to analogy, known as *istiṣḥāb,* that is, "by analogy to past experience," and with no evidence to the contrary, that testimonies are "extended" to the present.[84] But what it all amounted to, in the final analysis, is evidence of a *waḍ' yad,* or "occupation," meaning that the proceeds were the labor of this particular person or group irrespective of who "owned" that property "originally."[85] It is therefore a question of accepting "time (*zamān*)" as a crucial factor in establishing property rights, as the tenth general rule of the Majalla correctly states ("The old should be left to its perennial character"): for example, a plaintiff enjoyed that possibility in providing evidence that his *waḍ' yad* status ("occupation") over a period of time was justified, even though that property might not have been originally his.

That was accompanied by a general formalization in the process of accepting evidence, whether documented or oral. Indeed, and in a way strangely similar to the formalism (or objectivism) that shook the foundations of the American common law after the Civil War (thanks in part to the pioneering effort of Justice Holmes),[86] Ḥanafī practice (in particular in the more formal attitude of the Majalla) was looking towards the *external* manifestations of mutual assent. (Criminal settlements were also bargained for not in terms of the subjective intent of the accused, but of the external manifestations of the crime such as the tool of the killing: see Chapter 11 *infra*.) Thus, speaking of written contracts (e.g., sale), the third article of the Majalla maintains that "what should be taken into consideration [*al-'ibra*] are the purposes and meanings [*maqāṣid wa-ma'ānī*] rather than statements and syntax [*alfāẓ wa-l-mabānī*]": if, for example, in a donation, the giver stipulates that his donation should be compensated for, the contract ought then to be considered as one of sale since

84. Ḥaydar, *Durar,* vol. 1, commentary on article 10.

85. Article 37 of the Majalla states that "What is commonly practiced by people should be followed (*ist'māl al-nās ḥujja yajib al-'amal bi-hā*)"; and Ḥaydar comments (*Durar,* vol. 1) that the "*waḍ' yad* on a thing and having disposed with it (*al-taṣarruf fihi*) are an indication of formal property (*dalīl al-milk dhāhir-an*)." What establishes a "right of property" is a court's ruling that takes into consideration the "disposition" with the property over an extended period of time.

86. Gilmore, *Death of Contract,* 45-8.

its "meaning" (*ma'na*) has become associated with the general sale formula despite the giver's explicit use of "donation" (*hiba*). As soon as we move into the domain of the oral, however, the Majalla gives precedence to the "literal meaning (*al-ḥaqīqa*)" over the "metaphorical (*al-majāz*)": "The essence [*aṣl*] of speech is in its literal meaning [*al-ḥaqīqa:* truth]."[87] This "theory of language" assumes, on one level, a "literal meaning" where every word denotes unambiguously an "object"; thus, the "meaning" of a word becomes associated with its *common* use as Ludwig Wittgenstein had already noted in his *Philosophical Investigations:* "For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language. And the *meaning* of a name is sometimes explained by pointing to its *bearer.*"[88] At another level, the "meaning" of words and what they denote is more ambiguous: *some* words and sentences definitely have a "metaphorical meaning."[89] When we proceed from the literal to the metaphorical, it usually amounts into accepting the customary meaning of a thing or practice: in fact, sharī'a law very seldom admits that opinions, rulings, and adjudications change in time; and whenever it does, it recognizes the change only as forced through custom and habit.[90] There are words whose meanings need to be looked upon differently, or dropped altogether, simply because their customary usage has changed.

The fiqh therefore does not admit that either its concepts or juristic typology are subject to *internal* changes: that is, it neither admits conceptual flaws nor weaknesses of reasoning due to some internal limitations, nor limitations imposed by the very nature of language itself. All change has therefore to be *external:* custom could not only modify the nature of rulings and opinion-making, but could also introduce some new linguistic habits within the school. Notions like custom and language made possible the integration within the Ḥanafī framework of contractual practices (such as the *istiṣnā'* and *salam*) and property rights that would not have been possible in the first place. That was indeed even more evident in the various customary practices collectively known as *tamlīk al-manāfi',* the "ownership of the proceeds."

An ambiguity surrounds all *manāfi'.* On the one hand, if we understand by *manfa'a* as the proceeds of a land, that is, its yield, then those should be the

87. Ḥaydar, *Durar,* vol. 1, commentaries on article 12.

88. Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1958), §43.

89. Article 61 of the Majalla states that: "If the literal meaning is not possible then the metaphorical meaning should be considered (*idhā ta'adhdharat al-ḥaqīqa yuṣāru ila al-majāz*)."

90. The Majalla, opting for a more "secular" tone than Sharī'a law in general, admits that "it cannot be denied that rulings change with the change of times" (article 39); but Ḥaydar's commentary is more specific: "the rulings that change over time are those based on custom and habit" (Ḥaydar, *Durar,* vol. 1, commentary on article 39).

"property" of whoever labored them: such proceeds should in principle, like any other commodity, be eligible for exchange. In other words, their status should be that of a *māl mutaqawwam.*[91] On the other hand, if we understand by *manfa'a* the "right of usufruct" of a land, home, or shop, then the association of *manfa'a* with "property" might seem odd in the first place: shouldn't "the right to use" a property that belongs to someone else be associated with a "hire contract (*'aqd ijāra*)"? How does then *milk* come into the picture?

Schacht, who rightly included *manfa'a* in his chapter on "property," connects the notion of usufruct with that of a thing: "The usufruct is, in a certain way, regarded as a thing; the use is not a *ius in re aliena* but a property of usufruct. Then, however, usufruct is not merely associated to the other things but made the subject of special transactions; the contract of *'āriyya* (loan of non-fungible things) is defined as the gratuitous transfer of usufruct, the contract of *ijāra* (hire and lease) as the sale of usufruct, but they are nevertheless separate contracts."[92] What is of interest to us in conjunction with the practices of the sharī'a courts is the notion of the "property of usufruct" and how this "right" translates into "separate contracts" such as *gedik (kadak), khulū, marṣad, muzāra'a, musāqāt,* and *mashadd maskeh,* all of which share common norms: 1) they were all *part* of the broader category of a "lease contract (*ijāra*)": that is, they were not forms of contract all by themselves but included as clauses *within* a lease contract; 2) they mostly represented investments, in one way or another, from the tenant into the leased property; 3) such investments often became *values-in-themselves,* that is, they could be purchased, rented, transferred, or inherited, *as if* they were the "property" of the tenant: in other words, they became a "property" that was "separate" from the original property; and 4) all such legal categories, which historically came into being during the late Mamlūk and early Ottoman periods, which were more "patchworks" to the system than genuine substantive transformations, achieved through the practice of the courts, the full status of "property," even though that was never explicitly stated. Because of the confusion that surrounded the status of such judicial categories, it therefore needs to be known whether 1) they should strictly speaking be considered as *manāfi';* 2) they could achieve the status of "property"; and finally, 3) whether they should be considered as special lease contracts.

Broadly speaking, what we are concerned with here, concerning the categories enumerated above, is "something" which has been "added" by the

91. "In the case of 'things that increase' (*māl nāmī; namā',* the accession) the usufruct includes the proceeds (*ghalla*), including the proceeds of letting or hiring out. The proceeds can also become the object of separate rights of property, e.g., by legacy which confers a right *in rem;* these rights then do not include the right of direct use." (Schacht, *Introduction,* 134)

92. Schacht, *Introduction,* 134.

tenant to the leased property: basically, an equivalent to labor (even though the jurists did not see it that way) in the form of plantations, buildings, renovations, or rehabilitations. As George Young put it, "This right of property (*milk*) of the trees or constructions on a state-owned land, either 'possessed' by the same proprietor or by someone else, looks very similar to the '*jus superficiei*' in Roman law, in which 'the right over an area (*droit de superficie*)' is founded on the conception that an edifice or another structure located on real property belongs to someone without the soil or the land."[93] The basic idea, therefore, is that of the *separation* between the land itself (and its soil), on the one hand, and materials (edifices, plantations, etc.) located on the land, on the other: they could in principle belong to two different proprietors, and the second one could have initially been a regular tenant.

Thus far, in our discussion of property and contract, we have encountered a certain parallelism between the Majalla and the fiqh texts, in particular Ibn ʿĀbidīn's *Radd.* However, this ceases to be so in the final sections of the Buyūʿ chapter in the *Radd.* Surprisingly, these sections include important recapitulations from previous chapters or works (in particular the *Tanqīḥ*) on such notions as the *farāgh, khulū, kadak, kirdār, marṣad,* and *mashadd maskeh,* all of which were avoided in the Majalla. Why should such categories, usually associated with lease contracts, be included in the only chapter on contracts of sale? The Majalla not only avoided them in toto, but no specific articles are even devoted to many of the land categories essential in the Ottoman Empire: Could that be an indication that there was a concerted effort, in the second half of the nineteenth century, to forego many of the notions that might have become economically obsolete?

Ibn ʿĀbidīn begins his assessment of those newly imposed "hire" categories (apparently since the early eighteenth century), all of which it seems the outcome of custom and willy-nilly broadly associated with *buyūʿ,* by noting that "the usufruct is a property but not a thing subject to judicial transactions [*al-manfaʿa milk lā māl:* the usufruct is something that could be possessed but is not a property (of the tenant)]."[94] The *milk* is here defined as that thing to be disposed of for a specific purpose, which constitutes a legal relationship between an individual and a thing in which the right of possession is not only absolute, but also prevents others from possessing it; and the *māl* is what is stored (*yuddakhar*) until needed; therefore the *manfaʿa* cannot possibly be in this category because it cannot be "stored."[95] In his introduction to the

93. George Young, *Corps de droit ottoman* (Oxford, 1906), 6:68 (note 50).

94. Ibn ʿĀbidīn, *Radd,* 4:502.

95. The same argument is reiterated verbatim in Salīm Rustum Bāz, *Sharḥ al-Majalla,* vol. 1 (Beirut: Dār al-Kutub al-ʿIlmiyya, n. d.), commentary on article 125.

"hire (*ijāra*)" chapter in the Majalla, the commentator 'Alī Ḥaydar notes the "similarity" between a "contract of sale (*bayān al-bay'*)," which consists in "giving a thing as a property [to the buyer] for a counter-value (*tamlīk al-a'yān bi-'iwaḍ*)," and a "tenancy contract" which consists in "giving the usufruct [to the tenant] for a counter-value (*tamlīk al-manfa'a bi-'iwaḍ*)."[96] The similarity is indeed striking, in particular the association of "property" with a "tenancy contract." (We are far here from the French *Code civil* (1804) that looked at the "*locataire*" as someone exercising a *droit d'usage et d'abus.*) One of the peculiarities of Islamic law is its association of "tenancy" with *tamlīk* rather than with a "right of disposition." Ḥaydar gives a hint as to why the fiqh was historically at odds with the notion of *ijāra:* "Rent is a firm [notion] in the Qur'ān, sunna, and the consensus of the community, but it is against analogy [*qiyās*] because the object of such contracts is the *manfa'a,* that is, a nonexistent entity. Analogy requires the non-validity of rent, but it was accepted on the basis of need [*ḥāja*], and this because man is in need of the usufruct of things that he cannot afford to purchase. Not every person can afford purchasing the home that he needs to live in, or the bath that he needs for washing, or the mule that carries his body and things. But it is easier for him to rent such things and to take advantage of them."[97] Rent is therefore one of the basic legal categories that does not fit with analogy, and because other ones do not fit as well (such as the practices of *istiṣnā'* and *salam*), it became common practice to go forward with legal opinions in favor of local customs that could not be possibly deduced from the venerable method of analogy, and then deny the possibility that other opinions be deduced from them by the same method. In fact, the Majalla explicitly states such a prohibition in one of its "general rules": "What has been accepted against analogy cannot itself be the subject of analogy" (article 15).[98]

Bypassing the rigidity of tenancy contracts

Rent is therefore a problematic category in Islamic law and remains so even after the implementation of modern codes after the colonial period.[99] Accepted by necessity against analogy—as many customary practices are—

96. Ḥaydar, *Durar,* 1:371.

97. Ḥaydar, *Durar,* 1:371.

98. *Mā thabuta 'ala khilāf al-qiyās fa-ghayra-hu lā yuqās 'alay-hi.*

99. In contemporary Syria, Lebanon, and Egypt, among others, landlords have to pay large "compensatory" sums—sometimes worth half the estimated price of a property—to their tenants as a "compensation (*ta'wīḍ*)" for forcing them out of their rents, an action that usually has to proceed through the regular civil courts (a compensation very similar to the *khulū* in Ottoman Sharī'a courts).

and associated with *milk* rather than, say, a "right to use" the property, "rent" has become a core category in Ottoman times around which several sub-categories proliferated. It needs to be known therefore whether these sub-categories are to be associated directly with the notion of *manāfi':* Could they all be grouped together under the heading of *tamlīk al-manfa'a?* The question is important due to the large number of court cases in which a "tenancy contract" deviates into a "compensation" procedure for using the property or for having invested in it. In other words, many of these cases begin with a lease contract but end up with compensation requests. By requesting indemnities, the tenants either hoped for long-term leases below "the fair rent" or else in investing into property rights in conjunction with the leased property.

Prior to offering a thing for rent, it should be legally posited as "ready for acquisition of proceeds (*mu'add li-l-istighlāl*)." This "readiness" applies in principle to all kinds of objects: homes, *khān*s, baths, lands, and also animals. Article 417 of the Majalla states that "the lease of a thing continuously for three years is an indication that it is ready for acquisition." Another way of knowing the availability of a thing for rent is simply to make it publicly so. Usually, a tenancy contract is for a three-year period, but the court records are full of legal devices that extend the period either to a longer time framework or indefinitely (investing in the rented property, or seeking a ruling from a Shāfi'ī or Ḥanbalī judge were among the most common nineteenth-century procedures). Quite frequently, therefore, landlords encountered enormous problems terminating their tenants' leases. The court records show a clear trend of tenants becoming like "second landlords" imposing their will on the initial landlord (or a waqf's administrator) and bargaining on their own in the courts in order to sell a *khulū* or *gedik.* Broadly speaking, the phenomenon was that of tenants selling to the succeeding tenant, and with no apparent intervention from the landlord, of "the right of occupancy" so that the property becomes eligible once more for "acquisition": in other words, it becomes *mu'add li-l-istighlāl* all over again, after the previous tenant sold his "acquisition rights" (sometimes to the landlord). This "right of occupancy" has several technical names depending on whether the leased object is a home, shop, land, or an administrative position; belongs to a waqf; or needs a "right to cultivate." The broadest category that possibly applies to many of the available properties for rent is that of *farāgh* ("vacancy"): "What we said about the vacancy of a position [*al-farāgh 'an al-waẓīfa*]," notes Ibn 'Ābidīn, "could be similarly applied to the capacity to dispose with the *mashadd maskeh* ["right of cultivation"] of lands [...]. The same could be said on the vacancy of a tax-farmer [*za'īm*] over his *timār,* so that if he vacates it to someone else, and the sultan did not address it to whom it has been vacated for [*al-mafrūgh la-hu*], but left it with who vacated it or addressed it to someone else, there should then

be a compensation for the consideration to vacate [*badal al-farāgh*] from the tax-farmer to the one he vacated it for: because [the latter] only agreed to pay the sum on the condition that this right [to become tax-farmer] becomes his, and not just for the sake of the vacating, even if someone else takes it."[100] The general notion of *farāgh* shows that not only was it difficult for the common lot of individuals to own rural lands, but that renting these lands, or the shops and homes in the main cities, was an infernal process that often involved paying for "compensations," "considerations," "rights" and privileges. Thus, in addition to the slowdown caused by the majority of rural (and some urban) properties blocked as mīrī and waqf,[101] properties were inhibited by further restrictions when it came to actualizing lease contracts. But if the combination of mīrī and waqf lands blocked from circulation a large part of the "immovable capital," the damage caused by the *farāgh* system in all its forms was even greater: it robbed landowners and proprietors (including the beneficiaries of a waqf) from their genuine resources and placed "the fictitious rent"—that is, all kinds of compensations and privileges—into the hands of the tenants. This has lowered the "fair (real) rent" considerably (or what in legal terms is referred to as *ajr al-mithl*) because the landlord has to take into consideration the fact that his new tenant should pay to the previous one, in order to vacate the place, considerable sums of consideration (*badal*); and the ravages of such practices were so damaging in the long run that the payment of taxes has shifted from the landlord to the tenant: it is unfair, argues Ibn ʻĀbidīn in one of his *Rasā'il,* to force landlords and waqf beneficiaries pay taxes when the value of their rent has become insignificant.

An example of the privileges awarded to the tenant is that of *khulū* ("vacancy"): "The shop's *khulū* becomes the right [of the tenant] [*ḥaqq al-musta'jir*], so that the shop's owner has no right to vacate [his tenant] or rent it to someone else, even if it were a waqf."[102] Originally, in the case of the "first tenant," a specific sum, the *khulū,* is paid by the tenant to his landlord so that eviction becomes a difficult matter—unless, of course, the landlord pays back the *khulū* to his tenant, and whose value might increase over the years. Usually, however, it is a new tenant that refunds the *khulū* to his predecessor, and the sum is, of course, subject to readjustments over the years. The whole field of "exclusive possessions and privileges (*aḥkār,* s. *ḥukr*)"[103] became the subject of numerous fatāwā from the part of ʻAbdul-Raḥmān ʻImādī, an eighteenth-century Damascus muftī. Basing his fatāwā on the previous works

100. Ibn ʻĀbidīn, *Radd,* 4:520.

101. According to Ibn ʻĀbidīn, the majority of lands in Bilād al-Shām were waqf.

102. Ibn ʻĀbidīn, *Radd,* 4:521.

103. Commonly referred to as *iḥtikār* in modern Arabic.

of Ḥanafī scholars such as Nasafī, he accepted the various practices of *aḥkār* as part of the de facto status of "local customs (*'urf khāṣṣ*)" that could be integrated within "the general framework of the law (*al-ḥukm al-'āmm*)" even though analogy would not be applied in their case: thus, the legal device (*ḥīla*) here, as in the case of *salam* or *bay' al-wafā',* is to accept a common practice while bypassing analogy altogether and by limiting all possibilities for future opinions based on that specific case.[104]

A corollary category to the *khulū* is that of *kadak* (or *gedik* in Turkish) which basically relies on the same investment principles as the *khulū,* while being limited to the buildings and other materials added to the property.[105] What is striking about the *kadak* cases is their complete similarity with buying and selling contracts.

> **[C 3-3]** At [the court of] deputy judge [Ibrāhīm Efendi Usṭuwānī Zādah], Ḥājj 'Alī b. Ḥājj 'Umar Hāmish Nabkī purchased from Ḥājj Muḥammad b. Ḥājj Yūnis 'Aṭiyyah—the legitimate representative of his brother's three daughters, Ḥawwa, Maryam, and Āminah, daughters of Ḥājj 'Alī b. Ḥājj Yūnis, and of their mother, daughter of Ḥājj 'Ubayd Allāh Ḥalabī, and whose right of representation has been confirmed, based [on two witnesses] who know them and [whose testimony] has been legally confirmed—without any duress or coercion and based on judicial approval, what is in the possession [*milk*] of his [four] clients, and transferred to them legally from the inheritance of their father [...]: namely, the entire *kadak* and *khulū* of the barber's shop located in al-Kharāb, in maḥallat Taḥt al-Qutāṭ, and part of the waqf of the mosque of Taḥt al-Qutāṭ. [...] [All this] was sold for the price of one hundred piasters in genuine *amīriyye* silver, which was legally paid from the buyer to the representative of the sellers with his legal acknowledgment. [...]

Then comes a sort of "annex" to the initial hearing in the form of a fictitious "litigation":

> All this took place after the seller, as representative of his [four] clients, requested from the buyer two piasters—[the equivalent of] a debt [*dayn*] that the defendant [the buyer] owned to [the four women, the plaintiffs]—in order to fulfill a request made by his clients to receive the debt on their behalf, and also to sell the aforementioned items to the buyer. [...] When [the seller] requested from [the buyer] the sum [of two piasters], the latter acknowledged [what he owed] but denied [his opponent's right of representation; *jaḥada al-wakāla:* denied the representation] and asked him to furnish evidence. [The sellers' representative] brought [to court] for testimony the same two witnesses as above. They both testified that the defendant knew his clients, and that,

104. Bāz, *Sharḥ,* 1:248.

105. Ibn 'Ābidīn, *Radd,* 4:522; Bāz, *Sharḥ,* 1:248.

> at that date,[106] the clients appointed their representative to pursue the lawsuit against the defendant concerning the sum [the "debt"] and to sell [the *khulu≠* and *kadak*] to the aforementioned buyer [the defendant] for the above price [...]. The judge then ruled that the act of representation was legal and ordered the defendant to pay the sum [to the plaintiff].[107]

The second part of the hearing comes chronologically first: that is, the plaintiff-seller (and representative of the four women) claims, prior to the purchase contract, that the defendant-buyer owes his clients a small sum of money—two piasters, or 2 percent of the value of the sold object (*kadak* and *khulū*)—described as a "debt" by the two parties. The defendant then accepts the plaintiff's claim concerning the debt but denies his right to represent his clients. The plaintiff brings two witnesses and his right to represent is confirmed by the judge. I have argued elsewhere that the "debt" issue was a common procedure to establish the identity of a representative and his right to represent.[108] Indeed, such procedures were so common that they were used as plug-in modules in different contexts: property transfers, litigations over the revenues of waqfs, contracts of sale, etc. What is probably common to all such cases is that they all involved a *property transfer* of some sort (either through a genuine act of buying and selling or through a fictitious litigation), and due to the key role played by the representative (if any) who delivers the property, his identity and right of representation needs to be confirmed once and for all through a judge's ruling in such a way that would make it hard to revoke. But even though *dayn* is traditionally defined as "the *māl* that is one's *dhimma* as a result of a contract, consumption, or loan,"[109] its *practical* meaning comes probably closer to sixteenth-century English common law which took debt in its double meaning: as the lawsuit action resulting from an unpaid sum, and the amount of money that was due.[110] This *action for damages,* that is, the debt, could be exercised against the buyer if he abstained from paying the promised price. The English general theory on contract is indeed more interested in the *promise* than in the person.[111] What is of importance for our purposes is a similar notion of debt that emerges from a combination of discursive practices,

106. *Yawm tārikheh:* "the day of that date." Since there is only one date mentioned in the document, that of the hearing, the generic expression, *yawm tārikheh,* should mean, in this context, the date of purchase, that is, "property transfer," which is, formally speaking, also the date the representative (seller) was appointed by his four clients.

107. Damascus 266/1/1/18 Jumāda I 1224 (July 1, 1809).

108. See Chapter 5 *infra.*

109. Ibn 'Ābidīn, *Radd,* 5:152.

110. Montanier and Samuel, *Le contrat,* 15.

111. Montanier and Samuel, *Le contrat,* 11.

between the fiqh and the sharī'a courts. In fact, the debt issue which usually comes at the forefront of a number of different cases (C 3-3, 5-1 & 6-1), signals an action for a property transfer, on the one hand, and the debt itself on the other. However, in the unusual context of simulated litigations that were the norm throughout the nineteenth century, the "debt" ought to be read as the property or *manfa'a* that will be transferred from plaintiff to defendant (or vice versa). The "debt" was then only a simulated language for a property transfer that took place within a fictitious litigation. The whole purpose was simply to create an irrevocable ruling for a transfer already agreed upon.

As to the core of the case itself (C 3-3), that of the transfer of the *kadak* and *khulū* to another proprietor, a striking similarity could indeed be detected with the previous case of a regular buying and selling (C 3-2). In fact, the two cases could hardly be differentiated from one another: both *kadak* and *khulū,* together or separately, are forms of property that were transferable like any other property. In this case, *kadak* and *khulū* were sold as a combination even though—logically—the *khulū* precedes the *kadak:* in fact, the former is an "investment" from the tenant that establishes his *droit d'usage* for a long period of time—at least as long as the original proprietor shows no desire to refund the investment; the *kadak* comes on the top of the *khulū* thus representing an additional investment in buildings, materials, and equipment. Is it possible then to end up with one without the other? It is indeed possible to purchase or transfer a *khulū* without a *kadak* whenever the property in question does not include any extra investments in the buildings and similar materials; however, it was unlikely for a *kadak* be sold without its corresponding *khulū:* What purpose did it serve to have the *kadak* and its corresponding *khulū* with two different owners? This seems to be indeed an illogical impossibility since the property already has an owner, and the "owner" of the combination of *kadak* and *khulū* is a de facto "tenant."[112] (As the following case below will show, there were cases where only the *kadak* was the subject of the sale on its own.) In our case here, the barber's shop was part of a waqf compendium, hence the "original" (first) *khulū* was an investment paid by the tenant to the waqf's beneficiaries. That gave the tenant long-term privileges—a long lease with a low rent—below the "average price." Notice that in this case, nothing was mentioned concerning the waqf's administrator and beneficiaries: their approval or disapproval did not seem to matter much, and with the change of "tenancy rights" from one person to another, the new "tenant"—who had just purchased the *khulū* and *kadak*—will simply have to pay the "low rent" to the

112. The question remains open as to whether there were cases of *kadak* without a corresponding *khulū,* and why such an arrangement would be beneficial for the tenant.

waqf's authorities; and even the payment of this rent might not be necessary, depending on the value of the *khulū,* of course.

Both *kadak* and *khulū* were common examples of *manāfi'* which, in themselves, were *milk* and offered all the privileges of, say, privately owned properties. But even though as Ibn 'Ābidīn says, *al-manfa'a milk lā māl,*[113] or that *al-manfa'a ghayr māl,*[114] *manāfi'* such as the *kadak* and *khulū* represented, from a juristic point of view, exactly the same legal rights as any "thing" categorized as a *māl mutaqawwam.* Indeed, they were open to be purchased, sold, transferred, or inherited, and their contracts were like any regular contract of sale; the only reason for their classification as *ghayr māl* was because they cannot be "stored (*yuddakhar*)" like any other thing or substance. But this points more to an arbitrariness and confusion behind such classifications than a useful conceptualization. On the one hand, Ḥanafism does not look upon usufruct as a mere "right of use (*droit d'usage*)"; it is "more" than that, hence the source of confusion: *in addition* to a "right of use" of the property, this right is *itself* a "property"; but, on the other hand, this right-as-property is *ghayr māl,* and is therefore not granted all the advantages of the "things" exchanged on the market—even though the sharī'a courts seem to look at *some manāfi'* as subject to the same type of contracts as any property sale.

> **[C 3-4]** At [the majlis of] Mawlānā Sayyid Ibrāhīm Efendi Usṭuwānī Zādah, deputy judge of Sayyid Ḥafīd Zādah Muḥammad Amīn Efendi, judge in Damascus, 'Aṭā' b. 'Ubayd Allah b. 'Aṭā' Allah came forward and purchased from 'Uthmān Jalabī [...] what is in the possession of the latter, and was transferred to him by legal purchase, according to a document drafted in the majlis and emanating from Mawalānā whose signature appears above, deputy [judge] Ibrāhīm Efendi, previously the general judge of Damascus, and dated 19 Jumāda I 1220 [August 15, 1805], all the *kadak* of the shop located in downtown Damascus, in Sūq Bāb al-Qal'a, and designed as a butcher's shop. The *kadak* comprises the following: shelves, knives, a balance, [...],[115] copper, and other *manāfi'* [...]. The shop is owned by Mawalānā Muḥammad Amīn Efendi al-Walī Zādah, with other associates [...]. The purchase price was 700 silver piasters [...].[116]

The *kadak* was thus sold separately without the *khulū:* How was this possible and could a *kadak* be used without its corresponding *khulū?* In the butcher's shop above what strikes most was the importance of the *kadak* in terms of the variety of the utensils, while the description of the *kadak* of the barber's shop

113. Ibn 'Ābidīn, *Radd,* 4:502.

114. Ibn 'Ābidīn, *Radd,* 4:503.

115. In addition to other popularly named utensils: *tālī, qarmiyyah,* and a *fayḥ jadīd (?).*

116. Damascus 266/2/3/2 Jumāda II 1224 (July 15, 1809).

in the previous example (C 3-3) was much more limited. Furthermore, the two prices varied greatly (700 piasters for the butcher's shop versus 100 piasters for the barber's) due probably to the importance of the *kadak*'s material in the former; and the butcher's shop, as was underscored in the document, was the property of an individual, while the other one belonged to a waqf compound. In the final analysis, it could well be that no *khulū* was paid to the butcher's shop proprietor in the first place: the proprietor refused to be paid a *khulū* by his tenants on the grounds, say, that he did not need to tie himself up with long leases. (Notice that four years had elapsed between the two purchases of the same *kadak,* while in the previous case, the four women had inherited their *kadak* and *khulū* from their deceased father, and even though no specific date was mentioned, this is enough to suggest that the lease was long, at least long enough to pass from one generation to the next.) It therefore remains to be seen whether the combination of *kadak* and *khulū* was unique to waqfs, and whether the *khulū* played a similar role in waqfs to the *marṣad.* In fact, one of the reasons why the combination of *khulū* and *kadak* worked only for waqfs (and limited to the *kadak* in *milk*s) might be that the beneficiaries of a waqf (and their administrator) would typically opt for an "investment" in their waqf, in the form of a *khulū* or *marṣad,* with a long lease and low rent, because such a solution would increase their revenues for a while, and thus solve some of the waqf's financial problems, even though it would reduce it tremendously for future generations. An owner of a property, however, would find such an option—in the form of a lump sum "investment"—quite harmful: it might tie him for a long time with the same tenant and a low rent.

There were cases, however, in which the *kadak* and *khulū* corresponded with "rights" over a private property and were sold simultaneously, that is, as a combined unit. In one such case **[C 3-5]**,[117] the seller sold his combination of *kadak* and *khulū* of a butcher's shop in Sūq al-Sannāniyah in Damascus which he apparently had been using since August 25, 1798.[118] The document explicitly referred to the selling not only of the *kadak* and *khulū,* but also to the "utensils of the shop," and each one of them, as in the previous case (C 3-4), was listed. This is indeed strange considering that those should typically be already part of the *kadak* and were normally not listed separately. The buyer, who made the purchase on behalf of his four minor male children, was from the notable family of Qudsī Zādah; his purchase, whose value was 700 silver piasters, came roughly five years after the seller had completed his own. The

117. Damascus 251/47/78/10 Muḥarram 1218 (May 2, 1803).

118. This was the date of the seller's own purchase of the *kadak* and *khulū.* The judge's document certifying his ownership is referred to as *ḥujjat al-tatābu',* literally "a consecution (succession) document."

fact that the purchase was done on behalf of minor children shows that the combination of *kadak* and *khulū,* like any regular property, was an attractive solution to parents desirous to transfer properties to their children, rather than be limited by strict succession rules. This is definitely an indication on how much the combination of *kadak* and *khulū* was in itself a safe investment and enjoyed a similar status to *milk* in general (the only difference, of course, was that the *kadak* and *khulū,* once purchased, could not be leased to someone else): since the "real proprietor" (whose identity, unlike the previous case, was not even revealed) had no power to dislodge the "tenant" who purchased the "right of use" of the property, the latter became the de facto owner, and, in particular, if he had also purchased the *khulū,* kept the property on his own terms.

Thus far our reading of the legal texts and the corresponding cases show that both *kadak* and *khulū* manifested similar—if not identical—legal rights as any other "thing" posed for exchange: that is, they enjoyed *in practice* the status of things categorized as *māl mutaqawwam,* even though the fiqh did not formally acknowledge such a status in their regard. This leads to another observation: many private properties did not seem to survive from their "rent (*ijāra*)," but rather from all manner of one-time investments in their infrastructure. The annual rent itself often ended up being the most insignificant part—this was particularly true of waqfs—and below what "experts" would have classified as the "average (fair) rent." As an outcome of policies that benefited from the "vagueness" of the Ḥanafī category of "hire," *milk* properties were, in a way probably similar to the *mīrī* and waqf, more of a handicap to the "economy" than a liberating force. In fact, investments such as the *kadak* and *khulū* duo were like "dead capital" of a property: not only did they restrict the access of those properties to a privileged group that could have afforded the extra investments, but by limiting the effects of what might have been "genuine rent," they inhibited the circulation of capital in the form of "rent."

The *marṣad* (from *raṣada,* to appropriate) was another form of those "investments" in waqfs whose main purpose was to keep tenants with long-term contracts. And contrary to other types of "investments" analyzed above, the *marṣad* was not for sale, so that an investment from a tenant in a waqf property granting a long lease could not be purchased, together with its privileges, by another tenant. (Were *marṣad*s open for inheritance?) Literally, a *marṣad* is an "appropriation," money set aside for a specific purpose,[119] but in the peculiar language of the sharī'a courts, a *marṣad* was an "investment" that the tenant *had to* place in a waqf's property because it was a *necessary* step that was

119. In modern Arabic, a more appropriate term would be *māl marṣūd.*

unavoidable—basically, because of meager financial resources. The invested sum thus became a *marṣad* to the tenant, that is, it was "set aside" on his behalf so that a termination of the tenancy contract would have required, at the same time, a refund to the tenant. Needless to say, the whole judicial procedure was designed so that the waqf would *not* refund the investment, while accepting a low rent, below "average." In short, the tenant, having been generous to the waqf, now behaved like a proprietor, and while the beneficiaries of the waqf won an immediate lump-sum, their immediate descendants, however, saw their revenues decline—because of the super-low rents—and had to devise, in turn, other means to render their waqf more productive. In short, and to quote our influential authority one more time, "The large sums of money paid [by the tenant to the previous tenant or landlord] do not benefit the waqf in any way and only contribute in damaging it."[120]

Even though, technically speaking, the courts kept a different language between the *kadak/khulū* and the *marṣad,* the final purpose behind all such investments was strikingly similar: to create long-term leases for the category of tenants that could afford it; and, metaphorically, though not legally, the property becomes theirs. Such procedures did not originate as the result of an internal development in Ḥanafī doctrine itself, but were the outcome of customary practices that were so common to the point that there was no option left but to accommodate them. In terms of reasoning, therefore, they did not conform to the basic rule of analogy, and, in turn, no other rule could be derived from them by analogy. They look indeed like patches affixed to the system rather than substantive transformations that changed the way the legal system thought of itself: "Some have issued fatwās legalizing the *khulū* on the basis that it is the equivalent [*bi-muqābalat*] of the money paid [by the tenant] to the administrator [of the waqf] or landlord. The proprietor of the shop loses therefore his rights to evict [*ikhrāj*] [his tenant] or lease it to someone else. That was legalized in fatwās out of necessity [*li-l-ḍarūra*] by analogy [*qiyās-an*] to the sale of real property with the right of redemption [*bay' al-wafā'*] that the late jurists recognized [*ta'ārafa-hu al-muta'akhkhirūn*] as a legal device against [or as a way to evade] the loan with interest [*iḥtiyāl-an 'ala al-ribā*]."[121] Analogy should not be considered strongly here as it was more a question of "similarity (*shubha*)" between distinct issues than of applying the traditional rule of analogy.

As some of the above texts stated (and the Majalla underscored as an explicit rule), many of the commonly accepted "economic" legal categories,

120. Ibn 'Ābidīn, *Radd,* 4:523.

121. Ibn 'Ābidīn, *Radd,* 4:522-523.

in particular those derived from "rent" and "interest loan," were acknowledged with *prima facie* considerations with little or no relation to analogy. In the case of rent in particular, jurists were always faced with the problem of associating "hire" with *milk* (that is, *manfa'a* as *milk*), on the one hand, and with the labor invested by the tenant on the property, on the other: "When the tenant builds or plants on the waqf's land, he becomes eligible for a right of decision [*ḥaqq al-qarār*], and to [keep his rent based on] the average price: this is known as the *kirdār.*[122] Our scholars have declared that the owner of a *kirdār* has a right of decision. In fact, when the farmer and tenant [tenant-farmer] create on the land a building or plantations or labor on the soil [*kabs-an bi-l-turāb:* a pressuring of the soil] with the authorization of the waqf's founder or administrator, they are then eligible for keeping [the lease] [*tabqa fi yadi-hi*]. And it could be said that the money paid [by the tenant] as *khulū* to the waqf's founder, and which the founder used in building the waqf, is similar [*shabīha*] to working on land with its soil [*kabs al-arḍ bi-l-turāb*]: [the tenant] thus becomes eligible for a right of decision and his lease does not expire as long as he is paying the average [fair] rent [*ajr al-mithl*]."[123] What is of value in this passage is the association—based on the notion of "similarity"—between labor invested on a waqf's soil and the *khulū* invested in a waqf (or the *kadak* for that matter): somehow the *ḥaqq al-manfa'a* translates into a *ḥaqq al-qarār,* which in both cases translates into long leases and a de facto "ownership of the lease." The question, therefore, were lands in Bilād al-Shām *mīrī* or *milk?,* cannot find a proper answer unless we realize that because of the problematic nature of "rent" for *all* kinds of lands (even in urban areas), "ownership" was more the *milk* of the "usufruct" (*tamlīk al-manfa'a*) than of the land or buildings themselves. It is no wonder then that Ibn 'Ābidīn included his digressions on the *khulū, kadak, marṣad,* and the like, in the very same chapter devoted basically to contracts of sale (*buyū'*); they all were, in the final analysis, contracts of sale, even though their official title was not.

In the case of the *marṣad,* for example, waqfs should be able to maintain themselves from their own revenues. In principle, therefore, investments from tenants or other parties for the sole purpose of imposing long leases and low rents should be illegal: "What the administrator receives [from the tenant] should be invested in the building of the waqf, so that it becomes part of the process of its habilitation [*ṭarīq-an ila 'imārati-hi*]. And if by paying this needed sum on the building it turns out that there is no one willing to lease it with the average rent [*ujrat al-mithl*], then it is legal to inhabit the place out of necessity [at a price] below the average rent—and this is called in our times the

122. It is not clear what the roots of this term are.

123. Ibn 'Ābidīn, *Radd,* 4:522.

marṣad, as we introduced it in [the chapter] on waqfs."[124] What the language of such texts hides, however, together with that of the court documents, is that such investments were quite often on a voluntary basis, as a means for the waqf to beef up its revenues for a time, even though it meant more harm in the long run (lower rents). The texts also debated the issue of the rent to be paid by the tenant once the *marṣad* investment was completed: Should it be less than, equal to, or more than the "average rent" once improvements were added to the edifices? Even though the courts were plagued by proprietors and waqf administrators accepting a lower-than-usual "average rent," either because the tenant invested in the property or because no one else accepted the higher rent, the Ḥanafī texts were nevertheless uncomfortable on the issue of pricing on renovated properties. On the one hand, "if a judge or administrator authorized a tenant to build on the waqf's property, so that [the investment] becomes a debt [*dayn*] on the waqf, and there is nothing left over from its rent [*lā fāḍil min ray'i-hi*], [the debt] is then referred to as a *marṣad.* The building belongs to the waqf, so that if the administrator wishes to evict [the tenant], he should first refund him with what he invested in the building. It is no secret therefore that the [the administrator] pushes for an increase in the average price [*ajr al-mithl*] due to the improved building conditions. The tenant should therefore pay the average rent, whatever this amounts to, before and after the building has been completed, as it was suggested in *al-Fatāwā al-Khayriyya* [of Khayr al-Dīn al-Ramlī]."[125] But, on the other hand, "in the waqf al-Ḥāmidiyyah [?], it was established that a waqf's tenancy contract below the average price is possible whenever there is a problem [with the waqf] or it became indebted. This is in accordance with what we said because the *marṣad* is a debt on the waqf that ends up lowering the rent."[126] The *marṣad* acted therefore as a quasi-"debt," at least from the point of view of the late judicial texts of the second half of the nineteenth century, and tenants expected longer and lower rents because of their investments, even though such a decrease was not supposed to be a part of the investment.

But what kind of debt was it exactly? Was the *marṣad* a "debt" that acted like a loan? And what about a court's "fictitious debt"? How did it relate to a "real debt"? Several of our cases had plugged-in "fictitious debts," one of those court devices to identify a client's representative and his right of representation, on the one hand, and to simulate a litigation on the other. Ḥanafī manuals often describe debt as an "aphoristic thing (*māl ḥikmī*)": it is indeed a *māl* because it denotes a "thing"—whether money or a substance

124. Ibn 'Ābidīn, *Radd,* 4:523.

125. Bāz, *Sharḥ,* 1:247-248.

126. Bāz, *Sharḥ,* 1:248.

in kind that could be reduced to a common measure (*al-mithl*)—that is exchangeable. Yet, it remains limited to its "gnomic" dimension because it is not a "real thing (*māl ḥaqīqī*)": to be "real" it should have the capacity of being stored (*iddikhār*), like any *māl mutaqawwam.* But what saves a debt from the category of *māl ghayr mutaqawwam*—all those things that cannot be "stored"—is the awareness in the creditor's mind that once he will receive his money back, he will be able to store it and save it.[127] In other words, the existence of the debt is a virtual reality that becomes real once the debt is fully paid and back in the hands of its lender. By limiting "exchangeable things" to those that can be stored—or, generally, to tangible, perceptible things—to the *māl mutaqawwam*—Ḥanafism demonstrates an unease with the "*virtual.*" It is the *abstract* character of such transactions that poses a problem to jurists; and whenever the purchased object was not available at the moment of the contract, the jurists classified it as nonexistent (*ma'dūm*), thus creating the possibility of an illicit transaction.[128] That is why the debt is among the few contracts to create an obligation, while ordinary sales, which assume simultaneous exchange, do not. The *marṣad* then, as a debt, creates a long-term obligation, but it's the waqf that feels obligated towards its tenant.

Unlike the *khulū* and *kadak* cases, those with a *marṣad* were always structured around a false litigation, or a procedural fiction. The plaintiff-tenant is opposed to the defendant-administrator of the waqf, but that did not render such cases unpredictable; on the contrary, even though they turned more complex than others involving a quasi-debt, they ended up as predictable as any combination of a *khulū* and *kadak* case. In fact, litigations for a *marṣad* were well construed procedural fictions which transformed the hesitations and inconsistencies of the jurists (not to mention their silences when it came to procedural matters) on such "debts" into routinized operations within the expertise of the courts. Their aim was threefold: 1) establish that the tenant's investment in the waqf was legal and approved as such by the waqf's authorities; 2) the investment was then to be accepted as a "debt" that the waqf owed to the tenant; finally, 3) because of the money the waqf owed to the tenant, the latter was usually granted special privileges, known as *ḥaqq al-qarār,* and which commonly translated into a long-term lease. However, all three aims were first denied and challenged one-by-one, then acknowledged through witnessing, prior to the judge's ruling approving the investment, and, at times, the low rent. The fictitious litigation thus helped in establishing the threefold nature of

127. Ḥaydar, *Durar,* vol. 1, commentary on article 158.

128. The formal acceptance of such notions as *istiṣnā', salam,* and *bay' al-wafā',* was the result of long *détours* together with a complex process of *bricolage* for each notion taken separately: in other words, a higher level of abstraction that would coalesce such notions into a single concept was not even posed.

the tenant's investment on firm grounds in a way that would be hard to revoke; the litigation and the judge's ruling thus made it harder for future generations of beneficiaries to deny the tenant's deal with the waqf's administration.

In one such case, the plaintiff was the tenant and the defendant was the waqf's administrator—the routine form of a *marṣad* litigation.[129] The defendant was the administrator of his grandfather's waqf based on a judge's document dated January 7, 1795. The home, located in Damascus *intra muros,* and the object of the litigation, was subjected, according to the plaintiff, to a process of complete renovation, and this, after the defendant's formal approval.

> **[C 3-6]** An authorization was granted from defendant to plaintiff, two months earlier, in order to build and repair anything that the latter's home might urgently need. The costs should be at the expense of [the plaintiff] and everything he does will be considered as an appropriation for him upon the home and its waqf [*marṣad-an lahu 'ala al-dār wa-jihat waqfi-hā*]. Based on that agreement, the plaintiff did several things to the building such as a complete renovation of the tiled floor, the water pipes, etc., thus spending in equipment and wages a total of 1,861 piasters in pure silver of legal expenses from his own money, and with the purpose of benefiting [*al-rujū'*] the house and its waqf. Both the building and spending [on repairs] were absolutely necessary for the proper use of the house and because no money was available with the waqf's [authorities] to cover the spending. Furthermore, there was no one willing to lease [the place] with a rent that would have covered the spending [on renovations], and the investment is a common one [*maṣraf al-mithl*] that does not constitute a donation [*tabarru'*] to the waqf.

Thus far, that's the plaintiff's "own narrative" which recapitulates the main characteristics of a *marṣad* investment: basically, an investment—not a "donation"—for repairing and ameliorating the status of the property; an authorization was first granted by the administrator; and the point was underscored that the waqf's administration could not have afforded such expenditures on its own and that it was not possible to lease the place with a higher rent that would have gradually covered all expenses. In short, the case was made that all such measures were unavoidable: the tenant had no other choice but to spend from his own pocket and the waqf could not help but accept—the perfect match. From this point on the defendant will question each one of the above claims—a ritual that will help in their corroboration once and for all.

When the defendant was questioned on the plaintiff's claims, he acknowledged the authorization (*al-idhn*) but denied that the building and other spending were necessary and beneficial to the waqf. Two witnesses

129. Damascus 266/37/47/18 Jumāda II 1224 (July 31, 1809).

were brought and *repeated* verbatim the plaintiff's claims. As already noted, witnesses, unless directly challenged by the other party (denial of their testimony, etc.), were not supposed to bring anything new in terms of content; and their testimonies, *as summarized and paraphrased by the court's language,* were a mere repetition of their party's claim.

The waqf's administrator (defendant) then drew the court's attention to the fact that even though the tenant-plaintiff received his approval to proceed with the renovations, he did not receive a *legal* approval from the chief judge. In fact, and to complicate things even further, the judge in this case was a Ḥanbalite, opening the possibility for a rejection of the ruling by a higher Ḥanafī judge. The Ḥanbalite drafted a ruling acknowledging the necessity of the restorations, the amount spent, its beneficial and valuable side, and the fact that it became a *marṣad.* Even though the ruling was drafted by a non-Ḥanafī judge, it did not constitute what was technically known as "a ruling of a judge outside his school (*ḥukm al-qāḍī bi-ghayr madhhabi-hi*)." In fact, the idea here was precisely to have a Ḥanbalī judge accept a type of lease that was only acknowledged in his own school, only to let a Ḥanafī finalize the approval. Perhaps the most typical of such swapping-of-judges was for long leases: for the Ḥanafīs, a lease was not to exceed a three-year period. In order to secure longer leases, the tenant would proceed to a Shāfi'ī judge, who would ratify the longer bail; a simulated complaint would then point out that the lease was only approved by a Shāfi'ī, thus prompting a final ratification by a Ḥanafī. In *marṣad*s, such *détour*s proved to be overall unnecessary since cases were held right away by Ḥanafīs and worked well without extra-judicial needs. In our case, the Ḥanbalī judge made the point that he approved the authorization on a personal basis without seeking a chief judge's opinion; that, he claimed, was because "the private jurisdiction is stronger than a more general one [*al-wilāya al-khāṣṣa aqwa mina al-wilāya al-'āmma*]." In other words, judges had the power to rule based on the opinions of their own school even if it turned out that it differed from other school opinions. But the plaintiff still needed the final approval of a Ḥanafī judge, which he did, and finalized his lawsuit with a legitimate *marṣad* and a long bail: the procedure here, as before, took place in the form of a denial, on the part of the administrator-defendant, of the validity of a Ḥanbalī ruling. The Ḥanafī deputy judge, besides approving the plaintiff's claims, appointed, at the request of the administrator, a team of "experts" consisting of his own scribe, a plumber, and a Christian builder (*mi'mār sulṭānī*), to check upon the work done on the property. They all then testified upon the veracity of the plaintiff's claims.

The great majority of *marṣad*s were structured along the same line of arguments. Their purpose was simple: to guarantee that the tenant gets his legal rights for the invested sums in the waqf's property; and that, with the

connivance of the waqf's administrator who as defendant plays the devil's advocate: he denies every claim the plaintiff made—except for the alleged "repairs," but questions their usefulness—so that the latter is left with the only option common in all Ottoman courts—furnish evidence through witnessing. Obviously, not all *marṣad*s were structured in this straightforward manner. In another case **[C 3-7]**, the starting point was precisely where the previous case (C 3-6) had ended. A judge appoints a team of "experts" similar to the one encountered above in order to inspect a home in downtown Damascus included in a waqf compound.[130] The team did not seem involved in any of the factual information provided in the document, specifically on the home itself, or more generally on the modalities of the waqf. Even though introduced at the beginning, the team's expertise will be needed only towards the end—to check the status of the building. A description of the house and its location follows the "experts"'s names and professions, and a list of beneficiaries comes next. The founder of the waqf, Ḥājj ʿAbdul-Raḥmān al-Qawwāf, erected it, based on an act dated February 1, 1782, first for himself (he thus was in his lifetime the sole recipient of the revenues and self-appointed administrator), and then, after his death, for his wife who was to be the sole administrator and recipient. Then, after the wife, the revenues were to be divided fifty-fifty between the prayer callers of the Umayyād mosque (and to be administered by their own administrator) and the *maḥyā* ("shrine") and waqf of the deceased Shaykh ʿAbdul-Ḥalīm ʿAjlūnī, which should have had its own administrator.

Thus far, the first part of the document described the waqf, and its successive lines of beneficiaries and administrators, while the second part detailed the "operative facts" per se. There were four plaintiffs: the first two were cousins, both administrators of the waqf of the prayer callers, a post officially granted by sultanic decree (*barā'at*), and both had also been appointed by the judge presiding over this case, at the date of the hearing, as bookkeeping administrators (*nuẓẓār ḥasbiyyah*) to the Qawwāf waqf; the third and fourth were the ʿAjlūnī brothers, sons of the deceased Shaykh. So the plaintiffs as a group were the third line of beneficiaries, and were not supposed to have benefited yet from any of the revenues, and their target was the present administrator, Zaynab bt. Muṣtafa Qawwāf, wife of the deceased founder and the only beneficiary in the second line (the first was the founder himself); the second defendant was Zaynab's nephew, Salīm b. Muḥammad ṣayrafī.

The plaintiffs claimed that less than a month prior to the present hearing,[131] Zaynab had acknowledged her nephew's *marṣad* amounting to 3,000 piasters; but there was no indication, however, of any additional work.

130. Damascus 266/30/37/13 Jumāda II 1224 (July 26, 1809).

131. On 19 Jumāda I 1224 (July 2, 1809).

> The amount of money [allegedly] spent on building has no existence, and the second defendant, Salīm [ṣayrafī], did not construct anything in the house: all this is therefore pure collusion [*tawāṭi-yan*] on the part of the first defendant-administrator. The rent [*ujra*] of the house is equivalent to 200 silver piasters a year, and the [allegedly] invested money on the building does not conform to anything legal [*lam yuṣāraf li-maḥallih al-shar'ī*]. When [the team of "experts"] was sent to the location to seek the truth, they realized that there is no [new] building in the house in the first place.

When the judge was informed by the team of "experts" on the truth of the matter, he accepted their testimony and stripped the second defendant of his *marṣad*'s right. The primary defendant then addressed the plaintiffs to furnish evidence regarding the value of "the average rent (*ujrat al-mithl*)"; the plaintiffs had three witnesses who testified that the house's rent value should be 200 silver piasters a year. Having accepted their testimony, the judge ruled that the present administrator "has no right in leasing [the house] except [for the agreed upon] average rent, with the knowledge of the bookkeepers."

Even though this case differs greatly from the more common pool of *marṣad*s as exemplified in the previous one (C 3-6), it nevertheless exemplifies a pattern—by being an exception to the rule—that points to the very nature of the *marṣad:* an investment from the tenant that allows her a long lease at a lower price—on the basis that no other tenant accepted a higher rent. In this case, the third line of beneficiaries, which were supposed to be in charge after the death of the primary defendant, reacted promptly to the false claims of a *marṣad* investment. Interestingly, and unlike anything encountered thus far, when it came to knowing whether any work had been effectively completed on the property, the judge appointed a team of "experts" who inspected the place, rather than relying on traditional witnessing. Since that kind of expertise was relied upon in the two *marṣad*s analyzed thus far, it is quite possible that in cases that manifest a "clear-cut" aspect and in which a degree of "expertise" could be helpful, the judge would opt for that kind of "testimony"—one based on a degree of "expertise" and an inspection of the place prior to the hearing—rather than, say, request from one (or both) parties to furnish evidence on their own. The idea of "expertise," however, draws a parallel to that of traditional witnessing: "experts" typically gave "testimonies" in the same way that regular witnesses normally did: they neither drafted cosigned detailed reports nor memos describing the status of the property; instead, they ended up with a no-oath-collective-testimony not much different from a more regular testimony—the statements were a repetition of the claims put forward by one of the parties rather than based on independent observations and opinions.

Another issue that comes forward is that of "the average rent." That was the "price" that was usually in opposition to the price that the seller or

lessor thinks was the "real value" of his commodity or leased property; but, as discussed earlier, there was no conceptual apparatus that linked all these "values" together and assessed them in terms of tangible forces on the market. What the court records show, however, was that "the average rent/price" was nothing more than "the market price." The other price, real or nominal, apparently did not play much of a role. In the specific case of *marṣad*s, "the average (real and market) rent" implied, on the one hand, the same function as any other rent, whether private or waqf, in that a market price imposed itself in the final analysis; but, on the other hand, because of a *marṣad*-investment claimed by the tenant, and which, prior to court approval, ended up as a debt on the waqf, the value of the average rent becomes controversial.

In some *marṣad*s the investment "replaced" the rent per se: once the *marṣad* has been legally acknowledged, the invested costs are then "deducted from the rent." In one such case **[C 3-8]**, the defendant was the administrator of her father's waqf and had her post certified by the Ḥanbalī judge presiding over the case only a couple of weeks prior to the hearing.[132] The plaintiff claimed that the defendant-administrator had given her approval in 1789 to renovate the home subject to the litigation. (It remains unclear what the defendant's title was at the time, considering that her administrative post was only a recent appointment.). The original agreement, according to the plaintiff, was that,

> in 1204 [1789], the defendant gave her approval to the plaintiff to proceed with his renovations in the house, and to spend whatever is needed; and whatever was spent would be a *marṣad* on his behalf [at the expense] of the waqf [in such a way that the amount] would be deducted from the rent [*yanqaṭi' dhalika min ujrati-ha:* the amount will be "cut" from the rent].

The total cost was 2,100 piasters until 1214/1799 for the few listed renovations (kitchen, water pipes, external facades, the *īwān,* the *murabba',* etc.). When the defendant's representative was requested to respond to the plaintiff's claims, he acknowledged the permit granted by his client, but he denied that the renovations were necessary and beneficial for the waqf. Which meant that the plaintiff had now to furnish evidence, which he eventually did through witnesses. When the judge accepted all testimonies and ruled in favor of the plaintiff, there was the lingering problem of the non-compatible ruling of the Ḥanbalī judge. So, we're back to more procedural fictions: first, a claim by the defendant that the ruling cannot stand in its present form because the judge was not from the same school as the chief judge (basically, the quid pro quo between Ḥanbalites and Ḥanafites went through a two-step procedure:

132. Damascus 266/13/16/5 Rabī' II 1224 (May 20, 1809). The defendant's position of administrator was approved by the same Ḥanbalī judge on 17 Rabī' II 1224 (May 2, 1809).

a Ḥanbalī approves first that the invested amount is due on the waqf; then, a Ḥanafī judge having *mutatis mutandis* accepted his predecessor's ruling and adds, in his own final ruling, that the renovations and other new buildings were necessary); the Ḥanbalī judge presiding over the case clarifies that his ruling is limited to his own school; and a Ḥanafī brings the whole thing to its happy conclusion.

The *marṣad* was clearly a well rooted technique throughout the nineteenth century, and at least as important and as widespread as the combination of *khulū* and *kadak.* But were they all related? To be sure, they all were considered as representing some kind of "investment" on the part of the tenant, and upon ending his or her contract, the tenant should be refunded for having invested in the property. This "refund" did not have to originate from the proprietor, but it could well have been from another tenant. Such notions become "proprietary" on a de facto basis. Thus, while *khulū*s and *kadak*s were legally purchased like any other commodity without the interference of the original proprietor, the *marṣad,* because of its status as an investment in an inalienable property, was more looked upon as a "debt." In reality, however, the *khulū* was very similar to the *marṣad* since both represented investments in the leased property: this left the tenant with enormous privileges and secured him a long-term lease; however, while the *khulū* and its corresponding *kadak* were transferable, the *marṣad* was not. (What happens when the tenant dies and the waqf still owes him his *marṣad?* In principle, since this was a "debt," it should be listed, in the succession of the deceased, among the debts that should be refunded to the heirs. More empirical studies need to be completed to check whether, in such cases, at least one of the heirs claimed tenancy rights until the *marṣad* was completely refunded, that is, the tenancy contract of his predecessor and deceased relative became transferable.)

Gabriel Baer, who noticed earlier than others the phenomenon of *marṣad* (which he refers to as *murṣad*) in the courts of nineteenth-century Jerusalem, argued that such social and legal practices were inevitably tied to the upper classes of society, because they were the ones who controlled the waqfs as a whole, and it became more beneficial for them to modify the rules of the game that rendered waqf properties into stagnant investments. Baer described this process as one of "dismemberment," meaning that the property either loses its original form as set by the founder, or ends up partially "privatized."[133]

133. Gabriel Baer, "The Dismemberment of Awqāf in Early 19th Century Jerusalem," *Asian and African Studies,* 13(1979), 220-241. In the Jerusalem cases, *khulū* and *murṣad* seem to be tied together in the language of the court documents: *khulū shar'ī murṣad raqaba lahu 'ala* [the waqf property]. In fact, the *khulū* being "the most common device to establish private rights and assets on *waqf* property in early 19th century Jerusalem," it seems to have been a pre-condition for every *murṣad:* once the invested amount has

Be that as it may, limiting such practices to a class (which needs more empirical investigation, in particular for the *khulū*s, which seem even more ubiquitous than the *marṣad*s) does not necessarily help in following the legal and economic logic of such transactions. Moreover, Baer did not pose the issue of a possible similarity between the *khulū* and *marṣad,* in particular regarding their role as economic transactions whose contractual nature might have been the outcome of impasses in Ḥanafism. Both *khulū* and *marṣad* should be primarily looked upon in terms of the Ḥanafī discursive practices, which were not willing to equate the status of *khulū* with that of the other *a'yān:* "since the *khulū* is not a tangible thing [*'ayn-an qā'imah*], then its selling is invalid."[134] On what basis then were the *khulū* and its corresponding *kadak* "sold" in the courts? Everything seems to suggest, based on the realities of the courts, that the *khulū* and *kadak* enjoyed the full status of *māl mutaqawwam,* a reality that the fiqh manuals kept denying (the *marṣad,* which was not transferable but legalized as a debt, did not pose any problem as to whether it was a *māl* or not). On the other hand, even though the fiqh manuals did not subsume *khulū* and *kadak,* among others, under the abstract category of *māl mutaqawwam,* and thus made them eligible for exchange, they had to be associated, in order to be transferred, with the notion of *farāgh.* When an occupied space or position (*waẓīfa*) has been "vacated" in order to transfer them to another occupant; and, in the meantime, this other occupant owes the previous one a specific amount of money—*khulū, kadak, mashadd maskeh,* etc.—for having transferred to him this right of using the space, then that was legally a *farāgh.* The notion of *farāgh* is associated with that of "vacating a position (*farāgh al-waẓīfa*)," such as that of the *timāriot,* or of the *multazim.* In other words, in the same way, that the occupancy of some positions (in particular public ones) was looked upon as a "privilege," primarily because they were not open to everyone and were reserved to the happy few, the occupancy of space was also a privilege, so that when an occupant concedes this precious space to another tenant, a compensation should be given to the former.

Consider for example what was known as the *mashadd maskeh,* a sort of "right of cultivation" of the land on the basis that any tenant-laborer has "invested in the soil" and therefore enjoys privileged rights as tenant. In many respects therefore it manifests similarities with the other types of privileges

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been legalized by the court, it becomes the tenant's *khulū.* It is not clear, however, whether *khulū*s derived from *murṣad*s followed the same rules that *khulūs* generally did: that is, the general procedures of contracts of sale which made them transferable and inheritable like any other "property." The direct association of *khulū* with *murṣad* in 19th-century Jerusalem, seems more "logical" than their complete separation in the courts of Damascus. As argued above, both should be looked upon as investments in a private waqf property in order to grant the tenant special privileges.

134. Ibn 'Ābidīn, *Radd,* 4:523-524.

under contract encountered thus far: it was, like the *khulū* and *marṣad,* a form of investment that transformed the tenant into a privileged entity. But, the jurists, however, did not necessarily see things that way: for one thing, they could have subsumed all these types of investments under a more general category of, say, "transferable investments," but they didn't. Instead, they worked each one separately and independently of the other, and ended up with several shades of gray instead of a more convenient "general type." In the case of the *mashadd maskeh,* as for the other types of investments, "it cannot be sold because it is a *māl ghayr mutaqawwam.* So if its possessor [*ṣāḥibu-hā*] wishes to transfer it to someone else [*al-nuzūl ʻan-hā:* drop it] for a counter-value [*bi-ʻiwaḍ*], then the [normal] procedure would be to go through a *farāgh,* in a way similar to transferring positions [*ka-l-nuzūl ʻan al-waẓā'if*]."[135] The rationale is therefore that of "similarity"—analogy would be too strong a word—with at least the combination of *khulū* and *kadak* precisely because both constituted a "transfer of privileges" from one tenant to the other. But the *maskeh,* however, ends up disappointingly as another variant. First, "it has [specific] regulations based on sultanic orders from the fatwās of the *ʻulamā'* of the Ottoman state"; then, second, "it cannot be inherited. But it goes for [*tuwajjah*] the son capable of handling it, but not for the daughter; and when no son is available, then it goes to the daughter; and if she does not exist, then it is transferred to the father's brother [uncle]; and if he does not exist, then it is to the sister living in the village; and if she does not exist, then it is for the mother."[136] The transfer of the *maskeh,* therefore, follows specific rules unknown to either *khulū* or *marṣad,* and such rules were apparently not decided by jurists on their own, but were also the result of bureaucratic legislation. So the *maskeh,* because of its link with land production, did not conform to the same rules as the urban *khulū* even though logically it should have. Which leaves us with the following problem: Should such notions as *khulū, kadak, mashadd maskeh,* and to a certain extent, the *marṣad,* despite the jurists' resistance to such a categorization, all fall under the broad category of *māl mutaqawwam?* Or should they be classified as *aʻyān,* especially since their "exchange" does seem to suggest an implicit status of *māl* to all of them? Or, as the logic of legal history would suggest, they would all be more suitable under the broad category of *tamlīk al-manfaʻa,* and hence within a status that globally "opposes" them to all "tangible things (*aʻyān*)"? From the point of view of legal history, it would make more sense to classify "investments" such as the *khulū, kadak, marṣad,* and *mashadd maskeh,* as *tamlīk manāfiʻ:* they all achieved, in one way or another, the status of "private property (*milk*)"; this

135. Ibn ʻĀbidīn, *Radd,* 4:524.
136. Ibn ʻĀbidīn, *Radd,* 4:524.

is certainly true for both *kadak* and *khulū,* but probably less so for the *marṣad* and *maskeh* because of the restrictions imposed upon transferring them to other beneficiaries. Still, the idea here is that there was a *milk* category of intangible things—or of things that were "possessed" with a "right of use"—as opposed to the property of tangible things (*tamlīk al-aʿyān*). However, following Ḥanafī doctrine, they might also all follow the dubious category of *māl ghayr mutaqawwam.* In this way, and still according to the canon, this category comprises all "properties" (*māl*) not eligible for sale; but, for the type of "investments" discussed earlier, that handicap could be transcended thanks to the process known as *farāgh,* which "frees" the property from its actual tenant, and after payment of a "counter-value," it is then transferred to another tenant. In hindsight, therefore, those "non-exchangeable-things" achieved the status of exchangeable things through the legal device of *farāgh.* (Even though in the court procedures, one did not have to go through the ritual of *farāgh* to sell his *khulū, kadak,* or *mashadd maskeh; farāgh* was thus simply another fiction.) The intermediary step of *farāgh,* therefore, is more than ambiguous: it transforms many "tenancy rights" into "exchangeable properties" without, however, giving them the full status of *māl mutaqawwam.* In fact, "tenancy rights" fell under this ambiguous category of *tamlīk al-manāfiʿ*—a *milk* that did not follow the traditional categories of *tamlīk.* The system lacked the means for competitive rents, that is, whose values would have been assessed based on their market value. What the system created instead was a batch of "status contracts," to which the entry meant a *prima facie* lump-sum payment with quasi-ownership rights.

In the court procedures, "tenancy rights" were, in one way or another, associated with the notion of "equitable rent (*ujrat al-mithl*)." The reason why the value of rent had to be brought up either as a major or corollary argument varied from case to case. In *marṣad*s, for example, because the tenant's expenditure was to become a claim in his favor on the waqf property, the option was presented, at times, for the waqf to pay its "debt" to the tenant by deducting the rent on a monthly or yearly basis: the debt was thus paid into monthly or yearly installments; but the rent could also have remained the same, and the tenant would keep his contract until the debt was fully refunded. Another possibility was to claim that the rent might be low, but this was only because no other tenant accepted a higher rent: this was another legal device to keep the present tenant because, had the property been leased to another tenant, the waqf would be forced to refund the *marṣad* immediately. Still another possibility was to create a controversy around the equitable rent: the whole case would center on the sole issue of whether the rent was fair or not. This was whenever the contract was signed on behalf of a minor, or, as one of the cases outlined above shows, there was already a controversy over

the *marṣad*—how legitimate it was—that *ipso facto* extended to the equitable rent. However, establishing what the equitable rent should be was not an expertise area since only the usual witnesses could testify that *this* rent was indeed equitable.

A closely related, if not identical, category was that of "equitable price (*thaman al-mithl*)." Basically, the two categories of equitable (or average) price and rent were very similar, except that the legal area of the former was contracts of sale while the latter was limited to tenancy contracts; but in both, "value" was not determined by an expertise of any kind—witnesses were enough. But because contracts of sale were not surrounded by the ambiguities of tenancy contracts—some were indeed tenancy contracts in their form only, while at bottom they were contracts of sale of "tenancy rights"—their equitable price was much simpler: indeed, in what seems to be additional procedural fictions, the only aim was to prove that the price was just and fair. Typically, a case would begin with the usual description of the contract of sale and the sum of money involved; then, in a second part, the price itself becomes the subject of controversy, and the seller will have to prove that her property was sold at the equitable price. The case would finally be sealed with a ruling, thus making the controversial equitable price more acceptable. As with any ruling, the purpose was to force a decision that was hard to revoke. This was in particular useful in situations in which guardians were representing minors, or that involved an exchange of properties, and the like: once the minor matures, she might perceive that the equitable price was lower than what it should be; this would place the representative-guardian in a suspicious and awkward position and the minor could reopen the case.

In one such case **[C 3-9]**, a contract of sale was concluded between, on each side, a pair of guardians responsible either for the properties of their own sons and daughters or of other minors.[137] The sold property, located in a village in the vicinity of Damascus, consisted of an ornamental arcade (*bāykeh*)[138] and a straw-stack (*matban*), whose value was estimated at ninety silver piasters. In the second part of the hearing, a fictitious litigation takes place: the first seller claimed against the two buyers that the contract of sale was not in favor of the minor girl whom she was representing because "the price is below the equitable price and this is unfavorable for the minor and does not represent any advantage for her." The plaintiff-seller then requested from the defendants-buyers "to raise their hands (*raf' yad*)" over the fraction of property belonging to the minor in lieu of a compensation. The buyers denied that the price was below what was considered as equitable, and therefore, from their point of

137. Damascus 266/17/21/12 Jumāda II 1224 (July 25, 1809).

138. Probably a variation from *bā'ikat-un;* both being *'āmmiyya* language.

view, the transaction was indeed profitable to the minor. Since the plaintiff rebuked all claims and was unable herself to prove in claim way her own, the defendants were left with the usual option: witnesses who testified that the property was sold at the equitable price.[139]

In another similar case **[C 3-10]**, the contract was between a representative of a mature buyer, and two guardians representing[140] the interests of their minor daughters.[141] The purchased property, in a village in the vicinity of Damascus and consisting of a walled garden (*ḥawsh*), was inherited by the two minors from their father; they sold it for 120 piasters. What then follows is identical to the previous case (C 3-9): the two sellers metamorphose into plaintiffs and claim that the sale contract and its corresponding equitable price were unfair to the minors in that it was barely enough to cover their already precarious livelihoods; the buyer, having denied those allegations, and, upon the plaintiffs' insistence, furnishes evidence through witnessing.[142]

Many of the cases that centered around the notion of equitable rent/price were construed around procedural fictions similar to those encountered in other situations: property transfers, debts, distribution of a waqf's revenues, *marṣad*s, and even crimes,[143] to name but a few among those included in this study. Considering that the largest number of cases were either sale or tenancy contracts, fictitious litigations, whose volume comes next to that of regular contractual documents, could be looked upon as more complex sale or tenancy contracts (or their equivalent property transfers). In fact, the outcome of many of those litigations was, in the final analysis, either a contract of sale or a lease. But if they rarely stated their case openly, it is because many of these notions (*khulū, kadak, marṣad,* etc.) grew out of customary practices and imposed themselves on the judiciary; several legal devices had to be created in order to accommodate them, but that was not enough for the courts to openly deal with those contracts; hence the fictitious litigations, ambiguities, and disguises. In the specific case of documents centering around the so-called equitable price, their purpose was simple: fix the price once and for all.

139. A final note in the document asserts thathe entire above hearing took place after a "debt" was settled between the second seller and one of the representatives on the other side: as usual, this was a means to establish the identity and right of representation for the representative who pays or receives the "debt."

140. The rights of guardianship and representation were granted by the same judge presiding over the trial and at the same date as that of the hearing.

141. Damascus 266/18/22/12 Jumāda II 1224 (July 25, 1809).

142. In this case too, a fictitious "debt" establishes the representatives' identities and their legal rights in representing their respective clients.

143. See below Chapter 11.

The benefits of sharecropping

A related category of tenancy contracts was one that assumed an "association" on the produce between tenant and owner, which added to the rent already paid by the tenant. By far, the two most predominant types of sharecropping contracts were the *muzāra'a* and *musāqāt,* both which could be broadly defined as tenancy contracts of agricultural lands in which the owner receives a percentage of the produce in addition to the rent. The *muzāra'a* could be looked upon as a broader category than the *musāqāt* because the latter was limited to plantations only. The *muzāra'a* is defined in the Majalla (article 1431) as a "form of association (*sharika*)" over lands on the one hand, and labor (*al-'amal*) on the other. Association thus implies a relationship between land and labor rather than, say, between lessor and tenant-farmer (lessee). Such a distinction is essential because it determines in its own right which elements are to be legally classified under "land" or "labor." Thus, considering that among the "foundations (*arkān;* s. *rukn*)" of *muzāra'a* are land, seeds, labor, and cows, these "elements" do not work in any combination. Actually, there are only three possible valid (*jā'iz*) combinations:[144]

Lessor	**Tenant-farmer (lessee)**
land and seeds	labor and cows
land, cows, and seeds	labor
land	labor, cows, and seeds

Even though, from the point of view of legal texts, the two parties are not distinguished as "lessor" and "tenant-farmer," it makes more sense to look at them as such. In fact, the following article (1432) associates the *muzāra'a,* like any contract of sale for that matter, with the notions of "offer and acceptance (*ījāb wa-qabūl*)" on the basis of a contract between landowner and tenant-farmer. As to the logic behind the three tabulated combinations above, cows and seeds are seen as "extensions" either to labor or to land and cannot therefore stand on their own in any contractual form. Indeed, the cows are like a "machinery (*ālat*)" and are an "extension" to the laborer's body, in a way very similar to the needle of the tailor.

Sharing the rent

Even though sharecropping contracts were of a different nature than rent, since they implied sharing the produce between landlord and tenant, jurists

144. Bāz, *Sharḥ,* 2:759-760.

were nevertheless preoccupied with similar concerns as to rent in general. Thus, in the two most common types of sharecropping contracts in Ottoman times, the *musāqāt* and the *muzāraʿa,* a fundamental issue was whether *the landlord's share of the produce ought to be legally considered as the "rent."* If the landlord is receiving his "rent" by imposing on his tenant-farmer a share of the produce, would this be a legal thing to do, and should the "rent" in that case follow the same rules as any other rent? Or is the landlord's share nothing but a quasi-"rent," which in that case would need a different set of rules than for regular rents? Or should a formal rent be included even though the tenant shares his produce with his landlord? In that case, it needs to be seen whether a category as crucial as *ajr al-mithl,* which determines what a fair rent ought to be, still applies and is meaningful in a context where landlord and tenant share the produce. Be that as it may, sharecropping presents us with the same set of analytical problems as rent in general and its derivatives (*marṣad, khulū, kadak,* etc.), namely, that Ḥanafī texts proscribed rules that, when it came to the realities of the sharīʿa courts, the tendency was to circumvent them through procedural fictions. In effect, Ḥanafism places the practice of sharecropping within a similar range of constraints as rent in general, so that the applicability of such rules, in particular during the first half of the nineteenth century, becomes problematic at best. In fact, sharīʿa court records dealing with either one of the two major forms of sharecropping, the *musāqāt* and *muzāraʿa,* show a similar pattern of circumvention as, say, with the *marṣad:* a sharecropping contract is typically constructed on the basis of a fictitious litigation. Indeed, once the modalities of the contract are clearly stated in terms of what the shares between tenant and landlord are, and the rent is agreed upon, an individual posing himself as a potential tenant challenges the agreed upon rent and claims that it is far below the recommended fair rent (C 3-11 *infra*). He would also pledge that, if the court accepts his claim, he would be ready to accept the higher rent for himself. But since the (lower) rent price ends up confirmed by a couple of witnesses, the outside intervention of a potential tenant is no more than one of those numerous court devices that helped in creating types of contracts for which no specific legal language has yet been established. For reasons similar to the *marṣad,* sharecropping contracts were created as a way to manage uncompetitive low rents, short contracts, poor and uncertain harvests, and, at times, depreciating currencies. They were also typically limited to waqfs, a category that suffered the most from low rents. A sharecropping contract became one of the ways—and they were quite limited—of solving the low-rent problem while giving satisfaction to both landlord and tenant: the landlord received a rent-increment in the form of a share of the produce, while the tenant was granted a longer bail. In compensation for offering part of his produce, the tenant wanted that his low

rent not to be challenged and that his landlord would not ask for an increment at each renewal.

In Ibn ʿĀbidīn's *Radd,* the *muzāraʿa* and *musāqāt* come in two different chapters, one following another. But besides this sequencing, the organization of the sixth volume of the *Radd,* which follows the classical order of the *shurūḥ* manuals, does not help much in understanding the connections between chapters. Since the volume begins with the long *ijāra* chapter, one would have expected that forms of sharecropping, being variations of a regular lease, as a logical addendum to rent. But between rent and sharecropping, several other chapters intervene, such as usurpation, preemption, and partnership (*qisma*). Volume six is then completed with long chapters on homicides (*jināyāt*), the *diya,* wills, and inheritance (*farāʾiḍ*), among others. Sharecropping is therefore situated right in the middle of a richly packed volume, but in no way does its location help in understanding its connection to the other chapters. The assumption therefore that sharecropping is to be understood as a derivative of a lease contract does not come directly from the text itself, but stems more from a particular reading of those chapters and the few assumptions outlined above.

Unlike the *musāqāt,* the *muzāraʿa* was a form of sharecropping that did not involve plantations—*muzāraʿa* being the most commonly used term, at least in Ḥanafī manuals, from a variety of other more local (regional) terms such as *mukhābara, muḥāqala* (from *ḥaql,* field), or *qurāḥ* (in Iraq).[145] Ḥanafīs relate all sharecropping to germination (*inbāt*) because "both in language and in law, sowing is germination [*al-zarʿ huwa al-inbāt*]."[146] A person cannot all by himself produce plantations, but he can be the cause for their germination. Sharecropping consists therefore in sharing what causes germination: one effectively labors the land, while the other provides the tools (*ālāt,* s. *ālat*). The "tools" include all kinds of necessary things for land cultivation: not only the seeds, animals, utensils, etc., but even the land itself, which is usually provided by the landlord to the farmer. Ḥanafīs therefore look upon the experience of sharing first in terms of who did what: who gave the lands and the tools, and who did the work, all of which need to be quantified in some way. In practice, however, sharecropping arrangements might look hopelessly complicated. Imagine a situation where the landlord gives the land and provides his farmer with the seeds; the farmer, in addition to his physical labor, provides, in turn, for more of the needed tools (the animals, for example). In short, this is one among numerous cases where the tools are provided by both parties, thus making it even harder for the jurists to figure out how the shares should be

145. Ibn ʿĀbidīn, *Radd,* 6:274.

146. Ibn ʿĀbidīn, *Radd,* 6:274.

divided in such circumstances. But since such combinations emerged from customary practices, it is not to be expected that the fiqh manuals will show a great deal of logical and consistent line of arguments in this arena. As in other domains, jurists will link an activity such as sharecropping to previous canonical traditions, in both the scriptures and the fiqh, in order to apply a common line of arguments to different customary practices.

A Prophetic tradition places the emphasis on plowing and cultivation rather than on sowing because it gives importance to the act of disseminating the seeds. Such normative values only become important when trying to create a typology for the various tools used under specific circumstances; it also helps in emphasizing certain acts while giving them a contractual priority. Consider the case of a farmer who cultivated the land of someone else without his authorization, and then proposes to the landlord to reimburse him for the seeds so that he becomes the landlord's plowman; in other words, he is proposing to the landlord a de facto sharecropping contract. Concerning the reimbursement request, as long as the seeds have been disseminated (or consumed: *mustahlak*) in the land, a refund is inappropriate; but if case they simply "are (*qā'im*)" without being disseminated, the farmer becomes their sole owner and may request something in return. Thus, the logic here is that anything which has been already integrated within the land becomes ipso facto part of it, and hence part of the property of the landowner; otherwise, an alternative solution would force the landowner to give part of his property to the farmer for what he invested in it (labor, plantations, seeds, etc.). The tenant-sharecropper ought to keep the value of the investment—as part of the produce—all for himself, while the landowner receives the rest of the produce for his providing the land and all or part of the tools. The invested labor of the farmer in the land should therefore be valued in terms of a direct compensation paid in kind (or its equivalent cash) from the produce, rather than in any property right. Ḥanafīs thus leave no leverage to farmers who might have labored on a land without prior authorization, and who might then request a share in the property for having done so. Not only does the farmer (or unauthorized tenant) not enjoy any such right, but his sharecropping rights are not assured either, in particular if the seeds have become an integral part of the land: in that case, they are, like the land itself, the sole property of the landowner. The sharecropping contract must therefore come with explicit stipulations (*mashrūt*) in order for both parties to request their shares of the produce. Otherwise, a farmer who illegally cultivated a land, can still retrieve the grains he distributed over the soil, if that is possible, but he cannot request any share of the produce or of the land itself.

If the produce goes in toto either to the landowner or the farmer, the contract is no longer one of sharecropping, because in the first case the landowner

received help (*isti'āna*) from the farmer, while in the second, the farmer would have "borrowed (*i'āra*)" the land from the landowner. In the latter case, the "borrowing" of the land is legally identical to the *tamlīk al-manfa'a,* that is, it is no different in any way from a regular lease contract. The case of the farmer keeping all the produce is therefore legalized as an *ijāra* contract, and subject to the same regulations and requirements as any lease: since the farmer would eventually pay his rent from the produce, it differs from sharecropping in that there is no immediate sharing. Moreover, in a tenancy contract, the farmer decides on his own how to meet the lease requirements, while in a sharecropping contract, his options would be much more limited. In this perspective, sharecropping would be looked upon as a lease contract, but with severe limitations as to how the rent should be paid. One thing that the jurists agreed upon without much hesitation is that sharecropping should involve a genuine sharing of the produce; however, the possibility of the landlord receiving all the produce was left unexplored: Was the farmer paid any "salary"? In that case, that would constitute another *ijāra* contract since the farmer is paid an *ujra* for his labor.

The *muzāra'a* and *musāqāt* court cases are very similar in their structure and purpose to all contracts dealt with in this chapter—in particular the *marṣad.* In fact, like the *marṣad, musāqāt* cases usually required going through all the rituals of a fictitious litigation: a hearing presided over by a non-Ḥanafī judge (in this case, a Shāfi'ī judge that can accept a long-term lease), a plaintiff-defendant format arguing about the modalities of the tenancy contract, the *musāqāt* ratio, and finally the value of the equitable rent. Those were all part of a procedural fiction with a ruling that validated them. Both plaintiff and defendant end up with what they were looking for in the first place: a long lease, and a combination of *musāqāt* ratio and rent that is beneficial to both. Had they gone through the regular procedures of a tenancy contract, Ḥanafī practice would have contested almost each one of the elements agreed upon—hence the necessity of a fictitious litigation.

In one such case **[C 3-11]**, presided over by a Shāfi'ī judge, a tenancy contract was concluded over a sown waqf land in Damascus.[147] The lessor, represented in court by her son, was the administrator of her grandfather's waqf and leased her property for a nine-year, seven month, and nine-day period. The first payment, covering the first year, seven months, and nine days, amounted to fifty-six piasters (the extra months and days seem to have been a common procedure to "round off" a tenancy contract that did not begin in the first day

147. Damascus 266/16/20/7 Jumāda II 1224 (July 20, 1809).

of the calendar year). The contract also included a *musāqāt* deal: the lessor added to her rent one percent of the produce while the remainder was kept by the tenant. A couple of witnesses certified that the tenancy contract and its corresponding *musāqāt* deal were all legally concluded, were also beneficial to the waqf, and that the rent price was an equitable one (*ujrat al-mithl*).

As was typical of *musāqāt* cases, the hearing was not concluded with a legally accepted tenancy contract. Actually, the problem began when another potential tenant manifested his willingness to pay a higher rent than the one agreed upon thus far (in this case, the higher rent would have added thirteen piasters to the one already agreed upon in the proposal); that was then followed by a routine statement from the lessor's representative. But that only took place after the lessor's representative metamorphosed into a plaintiff accusing his tenant of a non-valid tenancy and *musāqāt* contract on four grounds: 1) the long-term contract; 2) the one-percent-*musāqāt* bonus; 3) the price below the equitable rent; and 4) as a result of all this, the tenancy contract not beneficial to the waqf. Having laid down his arguments, the lessor's representative then urged the tenant-defendant "to vacate the property, so that he would be able to rent it with the proposed increment." The tenant responded that as to the long-term contract and the one-percent-*musāqāt* bonus, their legitimacy was derived from the fact that they both were accepted by a Shāfi'ī judge, and that the value of the equitable rent was confirmed by the two witnesses (whose statements were referred to as the *bayyinah*), and, finally, that the proposed increment is "damaging and obstinate [*ziyādat ḍarar wa ta'nannut*] and lowers the rent [*tuqallil al-mu'ajjir*]." Even though no explanation is provided in the document as to why a proposed "rent increase" should in itself be damaging and "lower the rent," the logic seems to be that the combination of rent and *musāqāt* is a "better deal" than the stand-alone rent proposed by the other tenant. Be that as it may, what is of interest to us here is the actual tenant's acknowledgment that "the statements of witnesses over the issue of equitable rent did not take place in front of a legitimate opponent towards which the litigation would be oriented in the context of a legal lawsuit." To be sure, what the second part of the hearing does is precisely this: create a litigation (*khuṣūma*) so that everything that has been asserted in the first part is then reinforced through a two-judge ruling: first by the same Shāfi'ī judge presiding over the case, and who would give his approval over the combination of a long-term lease with the sharecropping contract; then, a deputy Ḥanafī judge would give a de facto final ruling based on his predecessor's approval. The contract was thus accepted after two successive rulings, and after the lessor claimed from the defendant a five piasters "debt" that he owed her; having requested from her representative to collect the debt, this was an opportunity for him—since this part of the hearing too took place in the form of a litigation—to clearly

identify himself and claim his exclusive right in representing his client, and also to initiate an action against the tenant.

In another similar case **[C 3-12]**, also headed by a Shāfi'ī judge, the conditions of the contract were as follows:[148] the tenant, who was himself administrator of his grandfather's waqf, leased (the rent was to be paid from the waqf's revenues) from 'Abdullah Efendī Murādī, who was acting as administrator on behalf of the waqfs of the Umayyād mosque in Damascus, a land in the city containing olive plantations; the rent, covering a six-year period, was valued at 141 piasters a year, in addition to two and a half *qinṭār*s of oil to be delivered at the Umayyād mosque with each rent payment. There was also a *musāqāt* deal on top of the rent in which one percent of the produce was to be added to the prestigious mosque's revenues. Then comes the litigation part, and in a procedure identical to the previous case (C 3-11), a proposal came from another tenant suggesting an increase of twenty-eight piasters and half a *qinṭār* of oil. Since the finale is also identical with the previous, there is no need to go once more over this type of procedural fiction, except to note that the document included, for the second portion of the land, an identical contract and litigation in which even the rent price and oil to be delivered were of the same quantities.

Such procedural fictions-cum-contracts do not differ much from the ones already elaborated upon throughout this Chapter, or from the other Shihābī cases involving large property transfers in Mount Lebanon (C 5-1 & 5-2 *infra*). In fact, the *musāqāt* contract, usually on the basis of a one percent of the produce allotment in addition to the equitable rent, was not in itself a contract *per se:* the sharecropping part was *added* to the original rent in a way that did not affect the usual form of all tenancy contracts; in other words, the rent as such was perceived by the tenant as a separate investment, to which was added the sharecropping part. This divides the contract into two parts: one was in cash—the rent *per se;* and the other one was in kind—a percentage of the produce. Because leases were for long periods of six to nine years (an arrangement that necessitated a rescue mission by a Shāfi'ī judge), such an arrangement, consisting of a combination of cash money and a percentage of the produce, might have been a way of taking into account either currency devaluations or inflation.

A general question arises concerning procedural fictions in general. One cannot help but realize that, throughout the nineteenth century (but since when exactly?), fictitious litigations have taken up much of the space of "genuine contracts": that is, as it turns out, a main purpose of fictitious litigations was to establish contracts that otherwise—under normal circumstances—would

148. Damascus 251/53/90/11 Muḥarram 1218 (May 3, 1803).

have been difficult, if not impossible, to establish. This was definitely the case of both *marṣad* and *musāqāt,* and many others involving what was known as an equitable price or rent. This raises the following question: Why, for every practice that was not originally part of the fiqh canon, and then accepted on a de facto basis, was a fictitious litigation needed? The reason might well be that such customary practices were not well integrated in the first place: in other words, they were patched over the fiqh corpus rather than constituting an integral part of it. Such an integration would have required following the basic rules of opinion-making and *ijtihād*—the Qur'ān, sunna, consensus, and analogy—but the process always failed at the analogy level: it became so difficult to accept many of the customary practices based on the traditional process of analogy that they were, *mutatis mutandis,* "accepted" by means of fatwās, opinions, etc., without an elaborate and rational process of integration with the principles of the fiqh. This is why it is indeed invalid to hold the view that an "acceptance" of custom is in itself an indication of substantive change.

Rent and its self-correcting practices

A striking feature of the Ḥanafī concept of "lease (*ijāra*)" is its derivation from *ajr,* broadly defined as *'iwaḍ al-'amal,* or a "compensation for labor." Considering that in this context, *'iwaḍ* is a compensation or indemnity for labor, the implicit notion is therefore the parallel drawn between leasing of land or a house, and paying a rent to the landlord, on the one hand, and hiring a person and paying him a compensation for his labor, on the other. On what basis then should the compensation for using a land (or a house) be conceptually similar to the compensation for labor? After all, besides the fact that an "indemnity" is paid in both cases, there is little to suggest that *ijāra* (lease, wage) and *ajr* (wage) are linked in some other way (e.g., labor). If in the modern capitalist (utopian) notions of nineteenth-century Europe, "wages are the price for the use of labor power, and form the income of those who sell it," and "rent is the price for the use of land and forms the income of those who sell it,"[149] there is nothing to suggest that, as far as Ḥanafī practice is concerned, "price"—and its related notions of labor and value—were a common and fundamental category to either *ijāra* or *ajr.* Not only was price not a common measure for "rent" and "wage," but neither was labor; nor was production for that matter (in turn, as price as *thaman* and *qīma* was not conceptualized in terms of "value" and "exchange commodity"). In fact, both *ijāra* and *ajr* had to be linked to price

149. Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957 [1944]), 69.

(*thaman*) without bringing production into the picture—as *ijārat al-mithl,* the fair (average) rent, and *ajr al-mithl,* fair wage, both of which do not denote anything more than an "average street price" of a commodity. Since rent and wage were not conceptualized in terms of production, labor, value, and the like, the only remaining alternative is to look at them as *consensual values,* that is, as accepted by the two contracting parties on a one-to-one basis as "fair." Thus, in the sharī'a courts, the notion of fair rent and price played an important role in determining whether a contract was legal or not, in particular in fictitious litigations—legal was being associated here with fair; but it all comes down to the performing of the ritual of one of the parties contesting the fairness of the price, backed by two witnesses that would testify that the price was indeed fair, so that fairness revolved, as did many other things, on a customary perception of what things were and ought to be. For convenience, we will designate *ijāra* (and *ujra*) as rent, and *ajr* as wage.

Another complication stems from the fact that "property" in Ḥanafī practice was associated with two different but related notions: *tamlīk al-'ayn,* property of the tangible object itself, and *tamlīk al-manfa'a,* the property of the use of that thing (usufruct, *jouissance*). Such a division had immense repercussions in the practice of the sharī'a courts: *manāfi'* such as the *khulū* and *gedik* were sold by the tenant separately from the tangible thing (*'ayn*), even without prior knowledge of the proprietor—a process commonly described as *bay' al-manāfi'*.[150] Moreover, "the *a'yān* are favored [*muqaddama*] over the *manāfi'* because they are not subject to compensation [*bilā 'iwaḍ*]."[151] Such a conception led to a notion of *ijāra* as nothing but the *tamlīk al-manfa'a bi-'iwaḍ,* a notion that associates tenancy with "possession." The tenant is therefore not simply using a land, shop, or house, but also possessing his right for using them. Such a right could, in turn, either be subject to a compensation, or else be sold (transferred/inherited) independently of the property itself. The "selling" (or transfer, or inheritance) of the "right" was in practice correlative to "compensation," which in effect was sold to the moving tenant. Moreover, all kinds of investments in the property such as the cultivation of the soil and its irrigation, a water canal that was added, tools that the tenant brought to his rented shop, a rehabilitation to a waqf's building, became ipso facto the "property" of the tenant, as if a second proprietor was created on the top of the one possessing the *'ayn;* but these two "proprietors"—and this indeed is an inadequate description—did not "share" the property (like two possessing two different portions of the same *'ayn*), but enjoyed different rights on the same property.

150. Ibn 'Ābidīn, *Radd,* 6:3.

151. Ibn 'Ābidīn, *Radd,* 6:3-4.

An understanding therefore of *ijāra* as rent requires first a complementary analysis to *milk, tamlīk,* and *tamalluk* as forms of "private property"—such terms need to be contextualized first in order to avoid any anachronisms with modern uses and abuses. In fact, modern conceptions of property, generally expressed in slight variations from ones in contemporary civil codes, all center around the notion of a *droit d'usage et d'abus.* This includes a right to *use* something—but not possess or own that thing—and *abuse* of it. The right to abuse of a thing, as a *"droit de nuire,"* which stems from a subjective right to use and abuse, has its own limits—as long as the assessed damages are not perceived as legally "excessive" or "abnormal."[152] From a comparative perspective, therefore, what is crucial in such notions is the emphasis on subjective rights: the right of owning a property is at the foundation of every modern civil code; follows then the right of using that property by *another* person who leased it for a specific time period. Property therefore is nothing but a social function,[153] since the *subjective* right of ownership, as stated and defended in civil codes, would lose its purpose without the *social* utility of property—as something to be "shared" by others—that is, legally leased by others—a lease that gives them a right to use and enjoy the benefits of that property; finally, the tenant also enjoys a right of abuse within limits. It would thus not make much sense in such systems for the tenant to "own" his right of using the thing he leased because that is part of the proprietor's right.

Excursus on marriage

Such rights are probably best understood when comparing, in the framework of each legal system, *the right to persons and the right to things.* Thus, in his introductory remarks to *Kitāb al-ijāra,* Ibn ʿĀbidīn reminds his readers that marriage is not a *tamlīk al-manfaʿa,* but rather a *tamlīk al-buḍaʿ,* that is, the possession of the vulva (*al-nikāḥ tamlīk al-buḍaʿ wa-laysa bi-manfaʿa*),[154] which is acquired, quite literally, by the payment of the dower (*mahr*) by the husband. The point here is that marriage is neither a contract of sale as such nor a tenancy contract for that matter—it is indeed a *tamlīk,* but of another nature. Marriage is therefore not the possession of a person, but rather the possession of a thing that the other person owns: namely, the female genitalia—and it is this ownership that renders sexual intercourse licit. Thus, not only does *reciprocity* not exist between men and women (since women cannot possess

152. François Ewald, *L'État providence* (Paris: Grasset, 1986), 481.

153. Ewald, *L'État providence,* 481.

154. Ibn ʿĀbidīn, *Radd,* 6:4.

a man's genital organs), but, more important, the right to things—such as the genitalia—is separate from the right to persons. In other words, the right to a thing—such as the man's right to his wife's genitalia—does not articulate well with the man's right to his wife. Even within a position of non-reciprocity, a man's right to his wife could hardly fit well with his right of possessing her genitalia. In short, in the notion of *tamlīk al-buḍa', tamlīk* should be taken literally as the *ownership* by the man of his wife's genitalia.

To understand fully the complexity of the right of ownership of a thing, a bit of comparative analysis might prove helpful for our purposes here. In the spirit of the eighteenth century European Enlightenment, Immanuel Kant understands "*sexual union* (*commercium sexuale*) [as] the reciprocal use that one human being makes of the sexual organs and capacities of another (*usus membrorum et facultatum sexualium alterius*)."[155] Besides underscoring reciprocity between men and women—at least as far as sexuality is concerned—the underlying theme is that of "right." In fact, the above passage introduces the reader to the section "On the Right of Domestic Society," and the first section is entitled "Marriage Right." "Right" is definitely one of the key concepts of Enlightenment philosophy, and Kant was much concerned in tracing the moral foundations between the right to persons and the right to things: "This Right is that of possession of an external object *as a thing* and use of it *as a person.* What is mine or yours in terms of this Right is what is mine or yours *domestically,* and the relation of persons in the domestic condition is that of a community of free beings who form a society of members of a whole called a *household* (of persons standing in *community* with one another) by their affecting one another in accordance with the principle of outer freedom (*causality*)."[156] In other words, Kant's concern is that "a right to a thing" is not "merely a right against a person but also possession of a person."[157] It is therefore the fact that "a right to a thing," which establishes a right of "possession of a person," that pushes Kant towards the formulation of "the Right of humanity in our own person." It is such a Right that renders this sort of acquisition possible for us. Thus, a man acquires a wife in the same way that a couple acquires children, or a family acquires servants. Kant is not so much concerned by the contractual side of such relationships as much as with the *moral principles* underlying them: such acts of possession—or acquisition—could only rest on a moral principle alone; and such a principle "must be the Right of humanity in our own person." If this principle did not exist, the acquisition of a person would

155. Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (Cambridge: Cambridge University Press, 1991), 96.

156. Kant, *Metaphysics of Morals,* 95.

157. Kant, *Metaphysics of Morals,* 95.

become the possession of a thing. Kant was well aware that the acquisition of a person is necessarily the acquisition of a thing—for example, a man's acquisition of his wife ipso facto implies a possession of her sexual organs, hence the possession of a thing—so that unless a moral principle underscores the *human* side of the relation, the acquisition of a person could then be *reduced* to an acquisition of a thing. To be sure, a contract in such a situation would be of no help in proclaiming the moral principle since contracts are usually about mutual obligations. Thus, a person is acquired *"as if it were a thing,"*[158] while a thing is acquired as a thing. When a person acquires a horse, the horse becomes his and he possesses it totally and fully. But when a man acquires his wife, he should expect, in turn, to be acquired by her.

In short, the philosophy of Enlightenment, knowing that a person is acquired as if it were a thing, was very much concerned in working out the dividing line between the possession of a person and the possession of a thing. To achieve this goal, it had to create elaborate notions centering on the Right of humanity. The approach of the Muslim jurists was obviously altogether different. Thus, when Ibn ʿĀbidīn puts forward his reminder that marriage is neither a tenancy contract nor a contract of sale, but the male's possession—ownership—of the female's vulva, the consequence of such an action, namely the possession of the person as if it were a thing, is not even posed; and since reciprocity does not come into the picture either, the acquisition of a person as a result of a marriage contract remains unilateral—that of a man acquiring his wife. Such an acquisition, however, is not reciprocated—the woman neither acquires her husband nor his sexual organs—the act of acquisition of a person—namely, a woman—becomes that of acquiring a thing. In fact, since Muslim jurists look at marriage as a contract with religious foundations—as a natural act consecrated by God in the Qur'ān—there is no need to look further at human principles that would serve as a further consecration of the act.

Tenancy from the canonical texts to the court practices

This marriage interlude shows the multiple forms of *tamlīk;* it also provides a few insights as to the articulation between the possession of the *manfaʿa* and the ownership of the *ʿayn.* Thus, while the *tamlīk al-ʿayn* is not framed within a time period, tenancy contracts are primarily characterized by a limited time framework and a compensation. More broadly, tenancy contracts should specify the duration (*mudda*) of a lease, the distance (*masāfa*) (if an animal or person was hired to transport something), the kind of labor (*ʿamal:* in case a

158. Kant, *Metaphysics of Morals,* 97.

laborer is hired, his specific task should be specified), and the compensation (*badal, ʻiwaḍ, ujra*). Thus, because tenancy implies *tamlīk al-manfaʻa,* the type of usufruct should be well specified in the tenancy contract (e.g., for the purpose of agriculture, planting olive trees, etc.).

But even though tenancy is to be associated with *tamlīk,* it nevertheless cannot be correlated with any form of a contract of sale. In fact, an *ijāra* contract is more closely that of a "possession (*taṣarruf*)" of the tangible thing (*ʻayn*) than an actual holding or occupancy with or without rightful ownership. Since only the tangible thing itself could be owned (and occupied and possessed), only the *ʻayn* could then be purchased and contracted on that basis. The *manfaʻa,* however, if sold, would imply the sale of a nonexistent thing, and this renders it invalid (*bayʻ al-maʻdūm bāṭil*). The *tamlīk,* therefore, of a *manfaʻa,* "does not occur in the language [*lafẓ*] of buying and selling,"[159] but only in that of a tenancy contract. Two preliminary conclusions could be drawn at this stage: 1) On the issue of *tamlīk al-manfaʻa* and the non-validity of a contract of sale in this case, the jurists basically adopted the same arguments that forbade contracts that in principle were by analogy close to *ribā* (*istiṣnāʻ, salam, bayʻ al-wafāʼ,* etc.): all such contracts implied selling a nonexistent thing and are therefore invalid; 2) Regarding the sharīʻa courts, such arguments were not taken into account, and the *manfaʻa*—in the form of *gedik, khulū, marṣad,* and the like—was sold and purchased exactly like any tangible object. Even though the recurrence of such contracts was far below than the more regular sales of *aʻyān* (houses, shops, lands, etc.), it does show once more that customary practices did prevail over anything else. As noted earlier in the chapter on custom, it was in Ibn Nujaym's *al-Ashbāh wa-l-naẓāʼir* that the legalization of *khulū*—based on the specific case of Cairo—became a norm and spread. Thus, the confusion stems from the fact that customary practices took *tamlīk* literally, while the jurists, who coined the words, were avoiding an identification between that form of *milk,* on the one hand, and *tamlīk al-ʻayn,* on the other.

Considering that the jurists were avoiding at all costs such an identification, and that they rejected tenancy contracts that identified with an act of sale, what is then the meaning of *tamlīk* in conjunction with *manfaʻa,* and why use the word at all? It should be kept in mind that in its three occurrences thus far—as related to tangible things, *manfaʻa* ("rent"), and marriage—*tamlīk* ends up with three different but related meanings. In a marriage, even though the husband acquires the ownership of his wife's vulva by the payment of the dower (*mahr*), marriage could nevertheless be neither identified with a lease nor a contract of sale. Such a contract is considered a sacred union between two partners

159. Ibn ʻĀbidīn, *Radd,* 6:5.

under God's consecration. Rent is another form of *tamlīk* understood more as a possession rather than an ownership—that is, the use of a thing (while in marriage, *tamlīk* goes more towards ownership). Finally, full ownership applies only to tangible things and not to the act of possessing them. Each one of those cases is a *tamlīk,* but only one is full ownership. In short, and in a nutshell: *tamlīk* does not necessarily legitimize *milk.* It might come close to it, or resemble it in some ways, but unless the object of ownership is a tangible thing, then there is no valid *milk.* It is as if the jurists, rather than widen their notion of property so as to include both the tangible and intangible, coined *tamlīk* for different situations in order to include, besides sales, both leases and marriages under this category.

Ḥanafī practice, however, draws few parallels between an act of sale and a lease. Thus, in the same way that a distinction ought to be made between a sale and a donation (or a gift), a lease is different from a loan (*'āriya*). Again, such distinctions operate most vividly in the terms of the agreement. Thus, if one says: "I will lease you this house for free," then this would be an invalid lease and not a loan (in the same way that an expression of the kind: "I'll sell you this object for free" is an invalid sale act and not a donation). Only if the contract is limited to a specific time frame does the loan become valid: "I'll lease you this house for a month for free."[160] Such examples show how much Ḥanafism attempted to impose specific forms of utterances in order to distinguish between a wide spectrum of social practices. Thus, having associated a lease with the payment of a *badal* or *'iwaḍ,* the *ghayr 'iwaḍ* transforms the act into a non-lease; but if a *ghayr 'iwaḍ* contract is limited to a time framework, the contract would then be valid as a loan but not as a lease.

Towards an objectivism in contractual practices

Many of the precepts that fill the *ijāra* books address indirectly—if not overtly—this "gap" between the *ought* and the *is,* considering that in real life situations, social actors do not necessarily use the linguistic norms proposed by canon law. Consider for example the whole notion of "a tenancy contract that gets established without any utterance [*in'iqād al-ijāra bi-ghayr lafẓ*]."[161] Suppose that someone leases a house for one year, and upon the termination of the contract, the owner comes to his tenant and informs him that either the house is freed right now, or else each occupancy month will be charged for a thousand dirhams. Now, if the tenant occupies the place for another month,

160. Ibn 'Ābidīn, *Radd,* 6:5.
161. Ibn 'Ābidīn, *Radd,* 6:5-6.

that would be in itself an indication that he tacitly approved the owner's offer: he should therefore pay the rent as stipulated by the owner. Notice that in this case, as exemplified by Ibn ʿĀbidīn, the owner *uttered* his proposal, while the tenant kept occupying the place without any record or utterance. So, while a proposal in the form of an utterance (*lafẓ*) did come from the owner, the tenant kept mute, and only a *gesture*—that of keeping the occupancy of the place—could be interpreted as an approval.

To be sure, the modalities of such contracts—those without a formal utterance (a "silence" from at least one of the parties)—come into several variations. Indeed, the "silence" of the contractors could be linked to the conditions of the agreement, or that of the contract's termination, or the contract's validity and invalidity. Moreover, and in a way strikingly similar to the arguments on custom, jurists accepted the idea that each contract is tied up to what is acknowledged as valid within a particular locality.[162] Thus, for example, the rent's value, as specified in a contract, must be valued only in accordance with local currencies so that the reference should always be according to "a locality's main currency [*ghālib naqd al-balad*]."[163] The crucial notion here is that of *ghalaba,* or the dominating practices that have been acknowledged as such. Not only did Ḥanafism acknowledge them, but it even posed them as a necessary reference for any valid contract: "in the case in which the *ghalaba* is different [from what has been established in a contract,] the tenancy contract becomes invalid."[164] This *ghalaba* encompasses in principle each possible category for every transaction. Thus, if the amount agreed upon is to be paid in cash, the type of currency ought to be specified: is it based on number, weight, measure, or something else? But there is always, within a locality, a

162. As Gilmore points out (*Death of Contract,* 49), in American common law, the link to the accepted standards of the community became crucial for purposes of "contractual liability": "I must show that my mistake was justifiable or excusable in the light of the generally accepted standards of the community." The point was to make both parties liable by giving them fewer excuses in the case of non-performance. That was achieved by 1) searching for the external manifestations of mutual assent rather than the more dubious, and less promising, subjective intent; 2) contextualizing the contract so that all utterances, forms of speech, and customs and habits are all associated to a certain locality; and 3) locking "consideration," which is an outcome to offer and acceptance, into a bargaining process ("the bargain theory of consideration"); all of which helped judges in their rulings whenever non-performance became an issue. Both parties would then become liable once all the formal requisites of offer, acceptance and consideration had been satisfied. Ḥanafism did attempt something similar—to define a "mutuality of obligation"—through a multiplication of procedural fictions of what constitutes valid and invalid contracts. But, in the absence of a solid tort law (which assumes a level of wealth in society), what kind of compensation did exist for the party that suffered from the non-performance of the other?

163. Ibn ʿĀbidīn, *Radd,* 6:5.

164. Ibn ʿĀbidīn, *Radd,* 6:5.

"decisive currency"—one that dominates all others.[165] In the same way, if the agreed upon payment ought to be fulfilled in kind, the type of object should be clearly specified (food, clothing, animal, etc.); then more details ought to be provided on the nature of the object, with some precise descriptions, whenever possible. What such objects represent, whether in cash or kind, is an assessment of the *manfa'a;* but because the *manfa'a* itself is not a thing that could be exchanged, a contract needs to be specific as to the use of a *manfa'a:* purpose, time, and place are usually among the most common coordinates. In other words, and in a way reminiscent of what a judge's ruling is all about and how it differs from a fatwā—namely, the combination of *ḥāditha* and *khuṣūma*—a *manfa'a* is only considered as a "happening," in the sense that "it does not have two times," and that the compensation (*badal*) should be *equal* to a *manfa'a*'s action happening right then. In other words, Ḥanafī jurists wanted to limit a lease contract to an event occurring in its actuality, rather than, say, to something to be fulfilled in the near future. This is why they were generally not much in favor of long leasess (*ijāra ṭawīla*) because a fixed "equivalent" would have already been decided for rents that could go up or down in time. Obviously, such arguments come close to those forbidding usury and other types of exchange. Exchanges between objects, or an object and a function (such as a *manfa'a*), are thus not only perceived on equal terms, but also within a time framework that limits itself to the present.

Considered as a form of "weak exchange," rent was looked upon with suspicion, at least much weaker and vulnerable than a regular act of sale: "Selling is stronger than leasing [*al-bay' aqwa mina-l-ijāra*]."[166] notes Ibn 'Ābidīn, in the middle of confusing opinions on what is valid for long-term leases: maybe the safest route would just be, say, for a thirty-year lease, to have thirty different contracts. Moreover, the jurists' insistence on equal exchange led them, in the case of payments to laborers, to request that the pay be simultaneous with delivery (*lā yajib al-ajr illā bi-l-taslīm*).[167] Exchanges are supposed to be "fair" rather than equal; or, fairness should tend towards equality.

Fairness comes as an essential aspect in particular when the use of a thing is exchanged for money, or when one's labor is exchanged for money. The exchange of two things on the market should also in principle obey the rule of fairness, but it does appear less urgent at this level. Broadly speaking, and whenever fairness is implied, it is usually the crucial category of *ajr*

165. It is known in modern economic theory that setting common standards for and the uniforming of currencies, weights and measures, are tools for considerably cutting down of transaction costs.

166. Ibn 'Ābidīn, *Radd,* 6:9.

167. Ibn 'Ābidīn, *Radd,* 6:17.

al-mithl (or *ujrat al-mithl*) that is at stake. The *ajr al-mithl* is a parallel and complementary category to the *ajr al-musamma,* or the "true" or "real" value of a thing; but how this is to be determined is another matter since the jurists never link such "values" to labor, salary, or rent for that matter. Jurists shared a general conviction that any exchangeable thing or labor have an intrinsic value of their own, similar in some respects to the "use value" of eighteenth- and nineteenth-century economists, but otherwise conceptually different. But the complementary notion of *ajr al-mithl* is not so much concerned with this intrinsic and real value of things as it is with their market value (or street price). The Majalla explicitly defines the *ajr al-mithl* (and all other *mithl* notions) as the price determined by knowledgeable people (*ahl al-khibra:* professionals); and in the sharī'a courts, the fair rent or price was usually bargained for through evidence in the form of witnessing.

Because the fair price could be easily challenged, jurists were mostly concerned with two issues: 1) Who has the right to challenge the *ajr al-mithl?* Should, for example, a judge terminate a waqf's lease because the rent was below the fair price even though the administrator had given his full approval?; and 2) What ought to be done with a low price: simply terminate the contract or request an increase? When, for example, a conflict emerges between a *nāẓir* and *mutawallī* over the rent's fair value—one accepts what is stipulated in the contract while the other does not—the decision to assess the fair rent and pay it "goes back to the tenant's consciousness [*al-ḍamīr yarja' ila al-musta'jir*]," meaning that "it is up to the tenant, according to some of our [Ḥanafī] scholars, to pay the full fair rent [*itmām ajr al-mithl*]."[168] So that if the property belongs, say, to a minor, and the rent is below its fair value, then it is up to the tenant to make the compensation. Such a requirement is even more true for waqfs leased at prices below what they should be because the waqf implies "blocking the tangible thing [*ḥabs al-'ayn*] and diverting its use for the sake of God." In fact, waqfs, throughout the nineteenth century (if not before), were the ones mostly affected by rents below their value. That could have been the outcome of non-vigilant or corrupt administrators (the dual system of *nāẓir* and *mutawallī* was primarily designed so that one supervises the other); but it was mainly due to the fact that the iltizām system, and the mīrī, which in reality were nothing but a full "rent" paid to the state via corrupt and greedy multazims, left little room for high or fair rents, so administrators had no choice but to lease their properties at very low prices (in conformity with mīrī properties). In such cases, not much could be judicially done because tenants were not in a position of unlawful usurpation: "as Khaṣṣāf's preference was [*tarjīḥ*], a tenant paying below the fair price cannot be accused of unlawful use [*ghaṣb*], and should

168. Ibn 'Ābidīn, *Radd,* 6:21.

therefore pay [from his own initiative] the fair price."[169] Thus, since, from a legal point of view, nothing could be re-adjusted for such contracts, and no one could force any of the contracting parties to change the rent's value, it was up to the tenant—and his own "consciousness"—to make up for the difference between market price and his own rent.

At some point, in his chapter on rent, Ibn ʿĀbidīn asks: "What is it really meant by an increase in the fair rent [*ziyādat ajr al-mithl*]?"[170] Overall, answers to such questions could only be relative as a general rule is impossible to establish, so jurists were left with cases that would render, say, an exorbitant increase in the fair rent legally unacceptable. Ibn ʿĀbidīn notes, in what seems to him as a less promising beginning, that most jurists spoke of "unrestrained increases [*ziyāda muṭlaqa*]" when it came to the *ajr al-mithl,* in the sense that the increase was determined solely by the desire to do so. In such cases, the increase (or the contract) should be revoked if exorbitant (*tunqaḍ ʿinda al-ziyāda al-fāḥisha*).[171] So that restricting the possibility of a nullification of contracts to exorbitant rents only is an indication that a moderate increase would be acceptable and does not constitute on its own enough reason to revoke a contract.

What role did the notion of *ajr al-mithl* effectively play in Ottoman times? To be sure, it was widely used in the sharīʿa courts for specific purposes—most notably in fictitious litigations (C 3-9 & 3-10). In such cases, the *ajr al-mithl* was a procedural fiction to make the contract sound *as if* a fair rent was effectively bargained, while in reality such procedures were a way out of the general lowering values of rents: not a fair rent anymore, but a *low* rent due to the unusual circumstances of a waqf or milk property in question (overall, in both *marṣad* and *musāqāt* fictitious litigations, waqfs were the target). In fact, special arrangements or investments within a waqf property often pushed proprietors towards even lower rents (on the basis that the tenant was, in turn, giving concessions of his own by "investing"). All this has rendered a notion like *ajr al-mithl* not only totally superfluous, but distorted from its original connotations by serving as a procedural fiction. Being aware of that, jurists did finally admit some of those "irregularities" (for example, the *marṣad* practice). Since, however, the *ajr al-mithl* became an outdated notion, one even abused, the most interesting passages in the Ḥanafī manuals were not necessarily those that defined a fair price, how action ought to be taken, and by whom, if the proper regulations concerning price fairness are not followed.

169. Ibn ʿĀbidīn, *Radd,* 6:30.
170. Ibn ʿĀbidīn, *Radd,* 6:23.
171. Ibn ʿĀbidīn, *Radd,* 6:23.

Texts discussing possible *increases* in the fair rent were more significant, but ought also to be cautiously read as well. In a way similar to discourses on the *'ushr* and *kharāj,* their "reality" is not immediate because they were always used in the sharī'a courts in conjunction with an array of legal devices (*ḥiyal*). For Ibn 'Ābidīn, controversies over the legality of rent increases served as an introduction and directly justified practices such as the *marṣad* and the *mashadd maskeh.* He first notes that the object of a tenancy contract could either be, at the moment of the proposed increase, an empty land (or house, shop, etc.) on which the tenant is no longer working, or else a cultivated and planted land. In the former case, if the tenant refuses the increase, the administrator could simply terminate the contract and lease it to someone else. In the latter, it all depends on whether the duration of the contract was over or not: if, for example, the contract came to an end, and the landlord proposed a raise which his tenant objected to, then the tenant has the right to keep the land until he is able to complete the production process; he should, however, accept the raise for the extra time it took him to finish his labor. Moreover, such a rule, which should work well for cultivated lands, cannot apply if the tenant is building or planting something on the land: in such cases, there are no well defined cycles, and therefore neither tenant nor landlord could determine how much extra time is needed. The proprietor could therefore force his tenant to accept the raise until the duration is over.[172] But in the case of the tenant refusing the increase, while at the same time he is involved in a project (such as buildings or plantations), then, once the duration of the contract is over, the administrator could request from his tenant to destroy (*qal'*) all plantations or buildings if it turns out that their presence is not beneficial to or harming the waqf. However, the main assumption here is that the proposed increase did not result from the plantations or buildings themselves, but from the property itself. Overall, as Ibn 'Ābidīn put it, jurists "tended to give the tenant the ability to choose, even if the removal [of plantations, *qal'*] [if it occurred] did hurt him. Jurists involved in the *shurūḥ* gave more choice to the administrator in particular [if the tenant's behavior] was harmful; otherwise, it is the tenant's choice. All this presupposes that the building activity [on the waqf's property] took place without the administrator's consent; because in the case where he did, then the building belongs to the waqf and the tenant should receive a refund from the administrator equivalent to his investment [*marṣad*], as noted in the *Fatāwā* of Abū al-Layth." And he then adds, with an emphasis that he is finally stating his *own* opinion (*aqūlu:* I say) rather than rehearsing the opinions of others: "It will be stated in the coming chapter that the tenant must

172. Ibn 'Ābidīn, *Radd,* 6:24.

leave [*istibqā'*] the building and plantations [which he added to the waqf] [rather than remove them], after the period of the *ajr al-mithl* is over—and he has no other choice [*jabr-an*] [but to do so] as long as this is not damaging the waqf [in any way]; and [I am aware] that this is in contradistinction [*mukhālif*] to what has already been stated in the *shurūḥ,* or in the fatāwā and the *mutūn,* as we will make it plain, if God wishes so."[173]

The significance of such opinions regarding increases in the fair rent are mostly valuable in light of the more complex legal devices such as the *marṣad.* In fact, in the *ijāra* book, opinions related to increases on the fair rent, and the rights of tenants and administrators that follow, come immediately before Ibn ʻĀbidīn's remarks on the *marṣad.* It is therefore safe to look at them as related topics. Consider, for example, the issue as to what ought to be done with buildings or plantations added by a tenant who then rejects an increase requested by his administrator. In practice, and within the jurisdiction of the sharīʻa courts, such opinions made sense only within the framework of the (mostly) fictitious litigations such as the *marṣad,* since it is unlikely that a tenant would invest in a property and then be ordered to destroy what he did. Thus, when Ibn ʻĀbidīn states that, as a *mujtahid,* and contrary to all the opinions of his predecessors, investments in the form of buildings and plantations should be kept as part of the waqf's properties, he is once more conceding to de facto practices which became quite common in Bilād al-Shām, if not in other provinces of the empire. In fact, his *ijtihād* directly prepares the ground for the crucial *marṣad* technique: in what he describes as "an important notice," he points out that

> whenever a judge—or an administrator, when the judge's authorization is not [directly] needed—approves a tenant's request to build [on the property he rented from the waqf], so that [the investment] becomes a debt on the waqf, because there is no leftover from its rent [*lā fāḍil min rayʻi-hi*][174]—and this is

173. Ibn ʻĀbidīn, *Radd,* 6:25.

174. It is far from clear how Ibn ʻĀbidīn perceives the relationship between the debt in the form of a *marṣad,* on the one hand, and the rent, on the other. The sharīʻa court records show three types of arrangements: 1) The tenant keeps paying the usual rent, *ajr al-mithl,* and can hold to his contract until his is completely reimbursed; 2) The tenant pays less rent on the basis that the discounted amount constitutes monthly refunds; he will keep his contract until the full debt is reimbursed; or 3) The tenant pays no rent at all because the waqf owes him money, and the monthly rent constitutes a gradual reimbursement. So what Ibn ʻĀbidīn seems to be suggesting in the above passage is that the "investment"—or *marṣad*—becomes a debt for the waqf (*dayn-an ʻala al-waqf*). This debt, however, cannot be paid immediately by the waqf authorities since "there is no left over from the rent [*lā fāḍil min rayʻi-hi*]," meaning that the rent itself is not generating, at the moment, enough extra cash that would be enough to refund the tenant. This is another way to say that the tenant's investment has been accepted simply because it is beneficial to the waqf even though the latter cannot afford it.

> what they call in our provinces [*diyāru-nā*] the *marṣad*—the building is the waqf's property; so that if the administrator wants his tenant out, he should reimburse [the tenant] the equivalent of what he did spend on the building. And it is not a secret that the administrator increases the fair price because of the building, so that in appearance [*fi-l-ẓāhir*] he needs the full fair price [*itmām ajr al-mithl*]. The difference between this [opinion] and what was stated in [Ibn Nujaym's] *al-Ashbāh,* is that in our case the building is part of the waqf, and thus [the fair price] should not increase because of the [building's] ownership. I have also noticed in [Ramlī's] *Fatāwā Khayriyya,* as part of a long question concerning the necessity of maintaining the *ajr al-mithl,* either before the building has been added or after, and whatever the consequences, that [the tenant] should be reimbursed for what he did spend [*al-rujū' bimā ṣarafa-hu*]. The truth of the matter is that in our times [the tenant] ends up leasing far below the fair price, pays part of the rent, on the basis that the rest he invested it in the building itself.[175]

What is remarkable is the openness and precision with which the *marṣad* phenomenon is accurately portrayed—as a "debt" incurred on the waqf, and which de facto considerably lowers an already very low rent.[176] But what remains unexplained is that general tendency towards low rents, and that other (related?) phenomenon of "status contracts," consisting of a *prima facie* investment as a lump sum-cum-rent to secure the longest lease possible.

Immediately following the above passage, comes a special section devoted to a *maṭlab*—the "requests" upon which the eight-volume work is constructed—regarding the practice of the *marṣad* and its "similarity" to other practices such as the "value (*qīma*)" of a commodity and its fair price, the *mashadd maskeh,* the *gedik* (or *kadak,* in Arabic), and the *khulū.* What they all share in common is that they represent a preliminary form of "rent," one that associates the tenant with a special contractual status, thus granting him or her a quasi-permanent lease in a low-rent market.

Transforming regular lease contracts into a combination of lease and an invested-deposit meant above all that the essential notion of *ajr al-mithl* lost many of its old connotations. Jurists began to argue either that it was not, under certain conditions, a necessary component of the contract, or else that it could be substantially lowered.

> In the *Fatāwā* of Ḥānūtī, it was suggested that a waqf could be leased below its fair price, in the case of its having a major problem, or if it was indebted. This is in conformity with what we had already stated regarding the *marṣad* as a

175. Ibn 'Ābidīn, *Radd,* 6:25.

176. In a similar way, a debt is neither something one owns nor is it associated with a *'ayn,* but is an "obligation" in the debtor's *dhimma;* while a contract of sale is directly associated with a *'ayn* and its simultaneous transfer, hence there is no more obligation upon its conclusion.

> debt on the waqf, whose rent decreases because of [the debt.] And in *Sharḥ al-multaqa,* based on [Ibn Nujayms's] *al-Ashbāh,* [it is stated that] a waqf should only be leased based on its fair price, only a little below [that price,] or [far below] only if no one wants it at this price. The same applies to the *kadak* [*gedik*], which consists in what the tenant builds into a waqf's shop, but does not count it on the waqf [that is, unlike the *marṣad,* is not considered as debt on the waqf]. The tenant sees what is indispensable [to the waqf property] in terms of building, rehabilitation, equipment, and the like, and sells [the *kadak*] for a high price. Because of the high price that a tenant pays for [the *kadak*], and his spending on the waqf, the fair rent ends up necessarily low. It is therefore possible that originally the building of the waqf is from the *kadak*'s owner [that is, the tenant], which is then handed in to the waqf's owner, who [adds to] the building and gives it to the tenant at a low price—a practice referred to as the *khulū.* The same applies also to the *qīma* and *mashadd maskeh* which cover small lands and the like. It consists of ... the right to plant and cultivate, which are sold for a high price: this is what pushes towards high rents; and those are among the things agreed upon.[177]

Again, and in conjunction with the previous passage, this one is even more remarkable in bringing together these special "rents" to a common root—that of low rents—and its compensation with a high-deposit investment.

For both *marṣad* and *khulū* (and other related notions), Ibn ʿĀbidīn links their acknowledgment to the early eighteenth century when a Damascus muftī, ʿAbdul-Raḥmān al-ʿImādī (whose fatwās he had himself so patiently updated in his *Tanqīḥ*), issued a series of fatwās legitimizing such practices. Such steps, however, should not imply that "custom ought to be considered as an absolute criteria [*iʿtibār al-ʿurf muṭlaq-an*] out of fear that this might open the gate of analogy [*bāb al-qiyās*] to many illegal things and tricks [*al-munkirāt wa-l-bidaʿ*]."[178] Out of fear that the piecemeal integration of customary practices might become uncontrollable, Ḥanafī doctrine must therefore limit itself into accepting acknowledged practices "only when necessary to do so" and only when "there has been an acknowledgment, without any denial, from the *aʿyān.* Such is the case of the *khulū* known [in connection to] little shops, and which consists in having the bequeather, administrator, or owner of the shop receive a certain sum from the tenant [the *khulū*], thus providing the latter with a legal right to keep the shop [for himself]. The owner would then lose his right to force his tenant to leave or lease the shop to someone else, unless he pays him back [his *khulū*]."[179] What Ibn ʿĀbidīn should have added is that the first

177. Ibn ʿĀbidīn, *Radd,* 6:26.
178. Ibn ʿĀbidīn, *Radd,* 6:26.
179. Ibn ʿĀbidīn, *Radd,* 6:26.

tenant who paid his *khulū* to the owner enjoys all the legal rights to sell it on his own, without even requesting from the latter to do so.

Throughout the Ottoman period, Ḥanafīs were continuously challenged by more demanding local practices which seem to have evolved out of socio-economic needs: "Our contemporary scholars agreed upon [such customary practices] and validated the selling [of the *khulū*] because the people need [this kind of transactions and contracts]." And the whole enterprise of allowing practices similar to the *khulū* find their way into Ḥanafism was initially based "on a procedure of analogy with [the notion] of *bay' al-wafā'* which our late scholars have acknowledged as a legal device to limit usury [*taḥāyul-an 'ala al-ribā*]." The sale of real property with the right of redemption (also known as *bay' al-'uhda*) thus became the basis upon which later opinions were constructed and approved as legitimate. But if the basis of such a procedure was analogy—at least in between *bay' al-wafā'* and the *khulū*—no further opinions, however, could be based by analogy on the *khulū* itself. Which means that other customary practices would have to be legitimized on an ad hoc basis—that is, literally force themselves into the body of the canon—rather than be constructed on the basis of an argument-based on analogy (e.g., by analogy to *khulū,* X would be legitimate). This was a convenient way to limit the large number of practices that could have been legitimized on the basis of analogy; practices had therefore to be accepted on other grounds than pure analogy: how widespread they were, the opposition between local and general customs, and whether they were beneficial to the community. In short, it all amounted to an act of *iḍṭirār,* what was necessary and unavoidable. Ibn 'Ābidīn rightly reminds his readers that one of the basic rules of the fiqh (*al-qawā'id al-kulliya*) states that "when a matter narrows down, its ruling widens [*idhā ḍāqa al-amr ittasa'a ḥikmi-hi*]."[180] Which brings the notion of necessity to the forefront: the more a customary practice imposes itself within a locality to the point that without it matters would become unbearable—what the general rule describes as tightening or narrowing—the more its legal impact becomes certain—muftīs and judges do need then to take such practices into account and even adjudicate on that basis. That seems close enough to another general rule: that "custom could serve as a basis for a ruling [*al-'āda muḥakkima*]." Still another way of stating the importance of custom: "What is customary achieves the status of a stated condition [*al-ma'rūf ka-l-mashrūṭ*]."[181]

180. Ibn 'Ābidīn, *Radd,* 6:26.

181. Ibn 'Ābidīn, *Radd,* 6:47.

The insidiousness of low rents

Our survey on contracts and obligations reveals several decisive elements that were inherent in the overall functioning of the judiciary. On the one hand, Ḥanafīs maintained an inadequate and obsolete discourse based on the notion of "equality" in exchange. But, on the other, all kinds of self-correcting customary practices attempted to bypass the law's rigidity and its static notion of equality. Those self-correcting practices, however, not only failed to alter the substance of doctrine, but even managed to transform some of its core notions into procedural fictions. For tenancy contracts, we have encountered four broad types of court practices unique to the Ottoman period, all of which aimed at providing users with much longer leases than the three- to six-year period allowed in Ḥanafī practice: 1) the *khulū* and *kadak* practices, which could either act separately or in conjunction with one another, and which consisted in investments, on the part of the tenant, in the rented property itself, be it milk or waqf; 2) the *mashadd maskeh,* or "the right to cultivate" a previously labored land, consists in the transfer of the investment of the previous tenant in terms of labor and other components; 3) the *marṣad,* also a tenant's long-term investment, but in waqfs only; and 4) sharecropping contracts of the *musāqāt* and *muzāraʿa* categories, and in which the "shared" produce was added ad valorem to the rent as such. Needless to say, the purpose of all three was both to readjust the price of the rent and to obtain long bails. Since a tenant's investment necessarily lowers the (fair) rent—something that even jurists finally admitted—the duration of the lease had, in turn, to be readjusted and lengthened. Of all four, the *khulū* and *kadak* combination was probably the least fair to the proprietor since he practically lost control of his property with no visible (tangible) gains. And while the *marṣad* represented a short-term advantage to both tenant and the waqf's beneficiaries—at least its first generation—sharecropping contracts were a clear attempt, from the proprietor, to readjust the rent's value by adding a share of the produce to it. The latter, based on a value in kind, kept prices in par with inflation and changing economic conditions.

Interestingly, self-correcting practices, in both penal and civil procedures, were very often represented as negotiations between disputing parties, which invariably implied procedural fictions whose role was mostly evidentiary in nature. The purpose of such practices, which for the most part were legalized, was to create economic efficiency in situations where markets were generally regarded as inadequate. How efficient they were, however, is beyond the scope of this study, but their dissemination within the court system is definitely an indication of their inherent necessity in a system plagued by low rents and poorly circulating capitals.

Chapter 4

Mourning the past:The thin line between ownership and possession

There are several advantages into forcing the discourse principle as the point of entry. First, theory and practice are not looked upon necessarily as two opposing poles. In fact, theory is supposedly the abstract discourse of the jurists, which prescribes the normative rules within a community, while practice is relegated to "applying the law," that is, the judicial decision-making process of the sharī'a courts, in addition to a few other related practices such as the drafting of fatwās. But by positing theory and practice as discursive practices, both levels are looked upon in terms of discourses they construct for their specific purposes—the discourse of the jurists and that of the courts (judges), or of muftīs. Second, the novelty here is the positing of court documents as discursive practices and the implications of such a decisive step: what becomes essential at this level of praxis is not solely how the courts "apply the law," but how such things as the presentation of a case by the disputants, procedures, witnessing and oath-taking, judgments, legal devices (*ḥiyal*), and the final ruling, are discursively constructed. Third, once the two levels of theory and practice are construed on the basis of their linguistic discourses, "theory" and "practice" become indeed relative terms since both levels—due to limitations imposed by language—are imaginary and practical at the same time. Thus, legal doctrines and fatāwā are no less practical than a judge's ruling. Any text is considered as representing the construction of "worlds" in themselves to which the social actors adhere.[1] Finally, the interpenetration of both discursive levels is the basic structure of law and initiates the circle's point of entry.

The above remarks, however, are not meant to imply that the discursive practices of the jurists and the courts share a similar structure or converge

1. This has been brilliantly articulated in Luc Boltanski and Laurent Thévenot, *De la justification. Les économies de la grandeur* (Paris: Gallimard, 1991).

towards the same goal (even though this might be true in few limited cases). For one thing, the discourse of the jurists is not construed around individual cases, but along a long line of opinions and a juristic typology whose conservation and renewal is at the basis of the jurist's own text. Moreover, jurists are concerned with the systematic character of the law and the normative rules it attempts to prescribe. At the opposite side of the legal spectrum, judges consider the case as the basis for their rulings; but in doing so, and besides the limitations imposed by the structure of language itself, they have to draft their rulings within the constrictions of the legal doctrines of their own school (this does not imply, however, that each case should be necessarily based on a specific doctrine). In order to equip arguments with decisive force, jurists need two cooperating contexts: cases and texts. But Islamic law created a distinct category between the two: the fatāwā, in themselves another form of textuality, have liberated the fiqh from referring directly to cases. This inevitably led to fiqh manuals obsessed with their own typology of opinions derived from centuries of experience and to a textuality, grammar, and syntax altogether different from the way judges drafted their rulings.

In order to describe the discursive intricacies of theory and practice, Habermas's distinction between facticity and validity could be of help in this context.[2] In sharī'a law, the validity of the system was primarily an outcome of the religious and divine character of the law. Not only did religion ensure the legitimacy of sharī'a law, but more importantly, it bridged the gap between the facticity of daily life—procedures of the courts, strategies of the social actors, unpredictability and harshness of "economic" life, etc.—and the validity of the system as a whole. Thus, the tension between facticity and validity found its solution on the assumption that a "fact is legitimate" only if valid under sharī'a law.

Cases should in principle enliven and bring new problems to texts, and texts, in turn, should point to what ought to be legitimately considered as a "case"; in other words, the seldom posed question, What is a "case"?, can only find its answer in light of the texts that render the construction of a case legitimate: in fact, social actors do not come to court thinking that any lawsuit would be acceptable as a valid case; instead, they slowly learn that rituals are at the heart of judicial life—and the courts in particular.[3] Yet, the most disturbing aspect of Ottoman sharī'a courts is the degree to which "facts" were eloquently vacated. To give one specific example among many—and

2. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, Massachusetts: The MIT Press, 1996).

3. See, Antoine Garapon, *Bien juger. Essai sur le rituel judiciaire* (Paris: Éditions Odile Jacob, 1997).

probably the most obvious—testimonies of witnesses were either accepted or rejected without direct or cross examination of any kind; instead, witnesses typically *repeated* their party's claims, and this repetition of the plaintiff's or defendant's statements, if left unchallenged by the opposing party and approved by the judge, was in itself enough "evidence." In fact, whenever a *bayyina* was requested, this invariably meant bringing a couple of witnesses to court, and having them take oath and testify (written documents were, by contrast, much less circulated and seem to have had less impact). The process of oath-taking and witnessing-without-examination brought predictability and an inherited matter-of-factness to the courts: oath as magical violence replaced the unpredictability of communicative socialization.[4] Thus, the core of the language of the sharī'a courts, instead of being construed on the basis of intersubjective communication—or individualistic speech acts—represented the authority of the judge's ruling and his paraphrasing of the others' utterances. Those texts whose telos was the ruling itself were strictly ritualized instead of opening up the proceedings to the unpredictable. Surprisingly, the construction of a typical court case very much paralleled the textualities of the jurists in the way it tied up all facts to norms. Thus, customary practices were favored over the intricacies of social intercourse and, in a way similar to oath-taking, introduced an element of inherited matter-of-factness.[5]

Counterfactual juristic discourse

Some of the above claims will be assessed by adding to the already discussed representations on judicial decision-making and custom, those on property, rent, and tax. At a first level, Ibn 'Ābidīn's discourse is reconstructed in terms of its own *discursive strategies:* Considering that his work represents a closure to Ḥanafī legal theory in its classical form—while the Majalla (1877) was a second non-classical and bureaucratic closure—how does it maintain that equilibrium between canon law and the realities of the nineteenth century,

4. Niklas Luhmann, *A Sociological Theory of Law* (London-Boston: Routledge & Kegan Paul, 1985), 88: "There is no decision made about the oath at all; it decides itself, and this not in the way of a judgment but in the way of direct effectiveness: in the form-dependent release of magical violence by engaging one's person." "The oath is a legal proof because that was already the case with physical violence which it replaces. However, the oath, as opposed to physical violence, offers better prospects of transformation into an instrument of procedural truth-seeking legal judgment."

5. Habermas, *Between Facts,* 30: "In contrast to convention and custom, enacted law does not rely on the organic facticity of inherited forms of life, but on the artificially produced facticity found in the threat of sanctions that are legally defined and can be imposed through court action."

or, more broadly, the Ottoman period? At another level, and considering that the majority of court cases were either contracts or contractual settlements, how well did this discourse articulate with the procedures, legal devices, and rulings of the sharī'a courts?[6] One cannot escape the reality that even at their most basic level—that of legal terminology—the two discourses did not correlate that well. Thus, Ibn 'Ābidīn's language, haunted by the classical distinctions between *'ushr* and *kharāj,* was not much in tune with the harsh realities of the *mīrī-iltizām* system as a whole (or its predecessor, the *timār,* for that matter). This does not imply, of course, that he was not aware of the land tenure issues of his own time; it simply shows that even for a pressing issue like landed property, the constrictions that the fiqh imposed upon itself, in terms of adherence to its own past, were more crucial for the survival of the school than coming to terms with the social and economic realities of the time. Discursive practices operate within the general diagram of power relations construed for a particular society. Thus, for example, the slow process of land commercialization in Ottoman societies and the desire to transform public holdings into private domains, have triggered individuals' disputes over status and landownership titles.[7] As a result, the observed "gap" in the discourse on land ownership titles and taxation is unique to land-related issues and the jurists' discourse—which basically ignored recognizing the system altogether—maintained a passive resistance to changing land exploitation patterns. However, in more conservative domains normally under "a private jurisdiction," such as personal status, marriage, divorce, and inheritance, the gap was much less pronounced. But, broadly speaking, the classical notions of contracts and obligations, not to mention crimes and torts,[8] which have survived for centuries in the Ḥanafī fiqh, even though they have remained fundamentally the same in Ottoman times, had all kinds of "marginal" contractual settlements attributed to them in which the "equality" and "immediacy" of exchange was altogether bypassed by means of the procedural fictions of the sharī'a courts.[9] In a modern framework, the notion of "gap," which is a notion of the social sciences rather than a legal one, usually denotes the common fact that judges, whenever confronted with hard cases for which no specific codes exist, need to "broaden" the statutes through an interpretive process that adapts old codes

6. See Chapters 3, 5 & 6.

7. Luhmann (*Sociological Theory,* 138) correlates the emergence of individuals' disputes over status and landownership titles in early modern Europe with the creation of a "normative order": "A normative order thus comes into existence—and this is something totally new—which facilitates a treatment of and decision on legal controversies."

8. See Chapter 11 *infra.*

9. See Chapter 3 *supra.*

to new realities (even though most systems deny that gaps do exist).[10] But in nineteenth-century Beirut and Damascus, the perceived gap between the juristic discourse and that of the courts achieves a different meaning, since not only basic terminological discrepancies became instituted within the system, but more importantly, the courts seem to have created their own procedural routines. This brings us to the main issue addressed in this chapter: Considering that all kinds of property and contractual rights that emerged throughout the Ottoman period were willingly ignored in Ḥanafī doctrine, and then only marginally integrated in the form of fatwās and procedural fictions, how valid is the notion of "gap" under those circumstances?

Judicial decision making and procedural fictions

Needless to say, the competition over landownership titles and status, in a way hitherto unknown in previous centuries, created a need for new *formulas* in the courts.[11] But due to the fact that the majority of lands in Bilād al-Shām were a combination of mīrī and waqf—hence by definition associated with a hard-to-change status—the *formulas* had to follow fictitious procedures. Hence the courts gave way to all kinds of fictitious litigations, in particular in substantial land transfers between family generations (Chapter 5 *infra*), or when the line of beneficiaries in a waqf needed to be modified (Chapter 6 *infra*), or when specific "tenancy rights" (such as the *khulū, kadak, marṣad,* or *musāqāt*) had to be officially recognized as legal "investments" in the property, thus transforming the tenant into an "alternate owner" (Chapter 3 *supra*). All such cases show a "*bourgeoisie d'affaires,*" crossing the traditional factionalism of the *a'yān,* and eager with the extra cash it had to invest in properties with an ambiguous status—and even modify if necessary that status.

Considering that the fiqh was too handicapped with its classical notions of property ownership to be able to properly assume major transformations, how were such *formulas*—the fictitious litigations—created, and what was the role played by judges in this process? First, due to the status of current research and the fact that the primary focus has been on the factuality of court documents rather than their analysis in terms of their *judicial writing* (or as "social texts"), it is impossible to know for sure *when* such *formulas* were

10. D. Neil MacCormick and Robert S. Summers, ed., *Interpreting Statutes: A Comparative Study* (Aldershot: Dartmouth, 1991), 177: "The concept of 'gap' is typically theoretical and not judicial." "Instead of drawing a distinction, French judges tend to disguise the filling of gaps as interpretation."

11. On the original meaning of *formula* in the Roman legal system, see, Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 23-27.

created, and whether the process was gradual or sudden. Second, by the early nineteenth century, such cases not only had well designed *formulas* but were quite *predictable* and safe. In fact, if, to simplify, we were to divide the judges' rulings between expected and unexpected decisions, then it is safe to say that there was no "great unknown" in decision-making. It is as if such *formulas* were not designed on a case-by-case basis, but rather to situate the "case" into something more generic.[12] Litigation (*khuṣūma*) was a safe path: it rendered a judge's ruling hard to revoke. Third, even though no major qānūnnāme were drafted after the seventeenth century, sultanic legislation did exist in the form of firmans, imperial orders (*awāmir sulṭāniyya*), edicts, and the like, all of which, either separately or as a combination, add another discursive level.[13] In nineteenth-century Beirut, such legislations were copied into the *sijillāt* of the sharī'a courts so that judges could refer to and apply them.[14] But more research is needed to check upon the extent of their applicability and to see whether they supplied the courts with a specific terminology and set of procedures (the same applies to the fatāwā which are thought to have acted as an intermediary level between the fiqh and the courts).[15] Fourth, the sharī'a courts were dispossessed in the 1860s, after the 1858 Land Code and the restructuring of the legal system, from their land cases: they proved to be too impractical.[16] Finally, it would be rushing towards unwarranted conclusions if we perceive the 1858 Land Code as some sort of legalization of the procedural fictions of the first half of the nineteenth century. For one thing, the Code and the procedural fictions belong to two entirely different and incompatible systems,

12. The same issues could be raised in the context of modern legal systems, see, for American case-law, Karl N. Llewellyn, *The Case Law System in America*, translated by Michael Ansaldi (Chicago: The University of Chicago Press, 1989).

13. See Chapter 10 *infra.*

14. Interestingly, such a procedure of memorization was not used in Damascus—except in the only sijill of the majlis of 1844-45—and it remains to be seen where those extra-legislations are hidden.

15. Fatāwā collections are of different kinds: 1) a marginal number of court documents contained their own fatwās: usually a fatwā was drafted at the judge's request, but the disputants could also seek the muftī's arbitration; 2) some fatāwā collections were a *tanqīḥ* of previous well known ones, such as Ibn 'Ābidīn's *tanqiḥ* of the muftī Imādī's fatwās; 3) a final category consists of less well edited and thought of collections, probably collected to help judges in their rulings and muftīs in drafting more fatwās; for the most part, they still are in manuscript form.

16. The sharī'a courts were gradually deprived, throughout the nineteenth century, of some of their more interesting and controversial adjudications: craft-guild litigations, even though common in the eighteenth century, ceased to exist by the early nineteenth, even though, surprisingly, the Damascus majlis in 1844-45 had quite a few of them; then, crimes were reduced to mere contractual settlements or as bargains on the amount of the *diya,* in case the crime had been acknowledged by the defendant (accused); finally, land cases, which turned out to constitute the best of what the nineteenth century had to offer, were relegated in the 1860s to other more specialized and newly instituted courts.

one French and the other Islamic. For another, if additional research shows that such procedural practices were also common throughout the eighteenth century, the "legalization" argument would become harder to sustain, simply because it makes no sense to assume that the Ottoman authorities suddenly woke up in the 1850s in order to ease land ownership when court procedures had already been leanig towards quasi-ownership for at least two centuries.

The self-transcending power of discourse

The above remarks are not meant to favor one discursive level over another—a common error in current Ottoman historiography—on the basis that one—the courts—is more "real" than the other. The two levels depend on and assume each other's existence in a strange way—in particular when their syntax and terminology seem so distant from one another. What they obviously have in common is their use of language; and because of this, they connect with and and open up to each other at other levels (or lifeworld spheres) as well. More important, because discourse is structured on language, it has a self-transcending power of its own: that is, it never attempts to solely embrace the factuality of reality; to the contrary, it transcends factuality by means of idealizations and counterfactual assumptions.[17] In the sphere of law this implies that juristic discourse creates normative rules whose validity claims exceed facticity. The sharī'a courts had to assume the validity of those normative rules even if they proved to be obsolete, and the discourse of the judges created its own correlative set of idealizations and normative values.

The sharī'a court documents have been looked upon by some researchers as of limited use in modern research due to their "summary" like method in covering "cases," while others have embraced them wholeheartedly as a major source for the Empire's social history. Yet, between these two extremes lies another still unexplored dimension of court documents: their textuality and discursive function. The focus on discourse shows that normative validity claims leave little room for the factual—empirical—elements that should in principle be at the heart of the courts' hearings (the parties involved and their representatives, their utterances, lists of properties, oaths and utterances of witnesses, etc.) to be able to force the litigations and hearings in an unexpected direction. Thus, the summary like method of inscribing a hearing in writing, and its strict coding of "what happened," shows how much validity claims

17. See, Niklas Luhmann, "*Quod Omnes Tangit:* Remarks on Jürgen Habermas's Legal Theory," *Cardozo Law Review* 17 (4-5 1996): 883-900.

exceeded, in such legal systems, facticity. It also points to the fact that much of language is indeed referential: it is about something whose existence it presupposes but whose ontology it may in fact be creating when it presents it as an object of speech.[18]

Looking for signs of landownership: the ambiguities of rent and tax

An important "chapter" in Ibn ʿĀbidīn's *Radd,*[19] on land, rent, and tax, comes concealed among the sub-sections of "Kitāb al-Jihād."[20] Such an insipid organisation only conceals the fact that the Ottoman *mīrī-iltizām* system was a long way from similar systems in the early and medieval Islamic empires—and only remotely related. One would have expected for that matter an entire Kitāb—if not a treatise on its own, as inaugurated in the early Islamic tradition by Abū Yūsuf's *Kitāb al-kharāj*—devoted to the Ottoman land tenure and taxation system. Instead, Ibn ʿĀbidīn followed the conservative path of his predecessors by limiting himself to the classical categories of *ʿushr, kharāj,* and *jizya,* all of which have become obsolete in an Ottoman context, even when the same term has been kept only to be used for other purposes.[21] Thus, ironically, in the voluminous eighth-volume *Radd,* which was completed by the author's son at a time when the *iltizām* system was already becoming history, there isn't a single chapter or section fully devoted to the *mīrī-iltizām* land-tenure system.

Ibn ʿĀbidīn begins this "chapter" with a recapitulation of the basic Ḥanafī notions on the *ʿushr* and *kharāj*. Lands divided among the Muslim conquerors, not on the basis of booty (*ghayr al-ghānimīn*), should be classified as *ʿushr*-lands (*ʿushriyya,* from *ʿushr,* or one-tenth of the produce) "because the kharāj should not be imposed [*yuwaḍḍaf*] on a Muslim" (4:176) even though analogy (*qiyās*) would suggest that such lands should be *kharāj* because they were in close proximity to *kharājī* lands; but Abū Yūsuf opted, however, for the consensus (*ijmāʿ*) among the Companions who decided that lands divided

18. See Samadar Lavie, *The Poetics of Military Occupation* (Berkeley: University of California Press, 1990).

19. Ibn ʿĀbidīn, *Radd,* 4:175-194: "Bāb al-ʿushr wa-l-kharāj wa-l-jizya." In-text sources, unless otherwise stated, refer to this section of the *Radd:* references are to volume and page number.

20. On the structure of the *Radd,* see Appendix 1 *infra.*

21. In nineteenth-century sharīʿa courts and majālis, *kharāj* has been completely dropped as a term; *ʿushr* was usually referred to in plural, either as *aʿshār, taʿāshir,* or *taʿshīrāt,* all of which, however, generally denoted the tithe extracted from mīrī lands; they also seem to have been used interchangeably with *amwāl amīriyya;* moreover, all such terms could have also referred to taxes paid on privately owned lands.

among the Muslim conquerors should be subjected to another "tax" category. Indeed, the fact that the division between *'ushr* and *kharāj* was a religious one was one of the most commonly held assumptions about the early Islamic "tax" system. Furthermore, Abū Yūsuf conceded that a land "brought back to life [*aḥyā*]" by a Muslim should be "sacred [*qurba*]," while Shaybānī identified water as the "first denominator [*al-mu'tamad al-awwal*]" to determine a land's status regarding taxation and other matters: because water itself could be either *'ushr* or *kharāj,* the status of the land should be determined accordingly. In fact, this separation between land and water produced an even more complex tax and rent system: some have suggested that a Muslim, whose land was irrigated by *kharāj*-water, should also pay the *kharāj,* while others insisted that as long as a land was *'ushr,* it did not matter much what the source of its irrigation was.

Be that as it may, two points are worth noting at this stage. First, it was essential in the early Islamic systems to distinguish between "taxes" collected from Muslims and non-Muslims. How sharp this distinction was is another matter since there were lots of debates in the long history of the Ḥanafī fiqh on whether both 'ushr *and* kharāj could be applicable on a single land lot. This did not make much sense to some jurists but it did to many others. Suffice it to say, however, that the distinction between 'ushr and kharāj meant a lot ideologically: in times of conquests, the fundamental distinction between *dār al-Islām* and *dār al-ḥarb* had also its "tax" equivalent.

Second, and more important for our purposes here, in whatever way this distinction might have operated in practice—whether it was a "sharp" or "soft" separation between the two "taxes"—what was essential was that a consensus was held among early Ḥanafī jurists that these lands were privately owned.[22] Thus, speaking of *'ushr* lands, Abū Yūsuf was adamant that the Muslim "owners" of such lands "should not be forced out later [*lā yukhrajūn 'anhā fimā ba'd,* meaning once they paid their dues and taxes], and they are allowed to inherit and sell them [*yatawārathuna-hā wa yatabāya'ūna-hā*], and the same applies to all localities [*bilād*] whose people have converted to Islam: [the lands] and what is on them belongs to them."[23] The same applies to

22. The concept of ownership in Islamic law—a distinction not yet actualized at the time of Abū Yūsuf—implied two related things: *tamlīk al-'ayn,* the tangible thing itself, and, *tamlīk al-manfa'a,* the use of the thing (a possession of the *droit d'usage*). What Abū Yūsuf meant by *milk* and *tamlīk* needs a full analysis of the *agencement* of his text, which is beyond the scope of this study. Suffice it to say, however, that his notion of "private property" was more moral than legal: it was not in the imām's interest to revoke an earlier decision concerning the assignment of lots of land to particulars.

23. Ya'qūb b. Ibrāhīm Abū Yūsuf, *Kitāb al-kharāj* (Beirut: Dār al-Shurūq, 1985), 178.

the Sawād[24] lands (the fertile lands in Irāq) which were mostly *kharāj:* "[The imām] has no right to take them [or confiscate them] from [their owners]; it belongs to them [*hiya milk lahum*] and they inherit and sell them and pay their kharāj; and they should not be demanded what they cannot pay [*lā yukallafūn min dhalika mā lā yuṭīqūn*]."[25] Once a privately owned land is confiscated from the person who owned it and granted to another either as a *'ushr* or *kharāj* land, that in itself would constitute a violation of the inalienable rights of the original owner and an act of *ghaṣb* (usurpation and unlawful use) as such: in such a case, the land should go back to its original owner "once a judge has established that it belongs to so-and-so, and that the imām so-and-so took it from him by force in violation of all his rights, and that it was assigned [*aqṭa'a-hā*] to so-and-so, the person who now owns it; it should therefore be taken from his hands and given back to its original owner from whom it was taken in the first place."[26] Abū Yūsuf's desire to protect "private properties" from abusive usurpation stems more from a moral standpoint than a legal one: in fact, the implication in all the above passages is that it is not in the imām's own interest to deny to particulars, or to their heirs, what he had already assigned to them. Thus, Abū Yūsuf never worked out a fully coherent concept of *milk*—how it should be legally protected, and on which basis a property ought to be considered as *milk*, etc.—since that kind of property was a *donation* (or gift) from the imām (or sultan), rather than something that an individual acquired through a laboring effort; even though the contractual nature of labor ought to have constituted the cornerstone of the sacred relationship between those particulars and the imām.

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24. From *aswad,* meaning black. The term "Sawād lands (*arāḍī al-Sawād*)" was one of those strange terms coined by the early Muslim conquerors on the agricultural lands of Irāq, which had mostly a Greek-Orthodox peasantry, and which were among the most fertile of the region. As indicated in Abū Yūsuf's *Kitāb,* early tax-assessments were on the basis of the number of "skulls (*jamājim*)," another one of those strange labels:

And 'Ayyāḍu b. Ghanam al-Fahriyy did a preliminary census of the skulls [*jamājim,* that is, the non-Muslim peasants] in the Jazīra: he calculated for every skull one dīnār, two *mudd*s of wheat, two *qusṭ*s of oil, and two *qusṭ*s of vinegar; he thus treated [all peasants] on an equal basis [*wa ja'alahum jamī'an ṭabaqa wāḥida*] [...]

When 'Abdul-Malik b. Marwān became caliph, he appointed al-Ḍaḥḥāk b. 'Abdul-Raḥmān al-Ash'arī [to the task of collecting taxes from the non-Muslim peasantry]. He thus counted the skulls [*aḥṣa al-jamājim*] and considered all people working with their hands [*wa ja'ala al-nāsa kullahum 'ummālan bi-aydīhim*], and then estimated what the worker [*al-'āmil*] gains [*yaksab*] in one year, and deducted from this the cost [*nafaqa*] of his food, clothing, and shoes; he also deducted all the holidays [*a'yād*] of the year [...] (§50, 139).

25. Abū Yūsuf, *Kitāb,* 179.

26. Abū Yūsuf, *Kitāb,* 174.

Genealogy of a legal fiction

Such a consensus was also reiterated among late jurists, among them Ibn ʿĀbidīn. The claim that the lands which were "conquered by force [*futiḥat ʿunwat-an*]" should remain the "property of its people [*mamlūka li-ahlihā*]" (4:177) was first put forward concerning the Sawād region in Irāq. Similar claims were later made concerning the conquered lands of Syria and Egypt: conquered lands, which were later divided among Muslims, were subject to the tithe, calculated on the basis of the one-tenth—the *ʿushr*—of the produce (yield), while the other remaining lands, "which were left by the imām in the hands of their own people who were defeated" (4:178), were subjected to the *kharāj* land-tax (non-Muslims also paid, in addition to the *kharāj,* a poll-tax known as the *jizya*). However, even though one tax, the *ʿushr,* was proportional to the produce while the other was a straight land-tax, both implied that the land in question was the "property of its people." Those lands, which were "private," could be rented, sold, or transferred by their owners from one generation to the next until there were no more inheritors (*wa tūrath ʿan-hum ila an lā yabqa min-hum aḥad*): the property should then be transferred to *bayt al-māl.*

What Ibn ʿĀbidīn outlined thus far became, for later generations of jurists like himself, the "legal fiction" upon which their entire "explanation" of the "tax" and "rent" system rested. First, the newly created taxation system of the first few centuries of Islamic rule was never perceived as one with direct *economic* motives, but rather as a system devised initially by the Prophet and his Companions as part of the religious and economic enterprise of the *umma.* Thus, it was no concern for all those who took the trouble to elucidate the workings of the system to point out differences between "tax" and "rent," or on what basis calculations and assessments were made, or how the cash "surplus" circulated for that matter. This is important to remember as a reminder that distinctions between "tax" and "rent," as *modern* categories of economic thought, should be taken cautiously for ancient societies, in particular in those where "rent" seems to be based on some *absolute* assessment rather than on a *differential* one ("modern rents"—that is, the "price" paid for the use of land—are valued *relationally* with respect to each other, or according to the "least productive land," as David Ricardo would say). Second, with non-Muslims gradually converting to Islam, and the state acquiring more and more land, the classical distinctions of *ʿushr* and *kharāj* fell into desuetude. However, as the case of Ibn ʿĀbidīn shows, such distinctions were kept alive in the fiqh literature. For one thing, adaptations and interpretations of the legal material needed to be perceived as part of an imaginary total history. Because this legal history had to be constructed in its totality, all arguments had to fit together in a single coherent whole.

It thus became common in the legal literature of the Mamlūk period and later to "explain" the massive state ownership of agrarian lands in terms of their "transfer to their treasury because of the death of their owners" (4:178). That story had several twists and turns: the death of a *kharāj* payer without heir; his property was then transferred to the treasury and thus became ipso facto the property of the sultan who acted like a "guardian" (*waṣī*) vis-à-vis his "subjects," the *ra'iyya,* who in turn enjoyed the status of "orphans" in need of being taken care of (obviously by the sultan who acted as their sole guardian). Because Ḥanafism posited the guardian as enjoying the right of "making use" of the orphan's endowment in a way that should be "beneficial" to the latter, the sultan was thus justified immense (natural) rights to keep or sell the properties he wanted.

Even though in his magnum opus, the multi-volume *Radd al-muḥtār,* Ibn 'Ābidīn did not even include a single chapter on the *mīrī* or *iltizām* or the older *timār* system (and seldom did he refer to them by name for that matter), he nonetheless addressed the issue, in a few pages, of the ambiguous nature of what he referred to as the "sultanic lands" (commonly called *mīrī* lands) in Egypt and Syria (Shām), in the chapter on "Bāb al-'ushr," which in itself is confusing since the *'ushr* was par excellence, in the classical Ḥanafī doctrine, one of the taxes imposed on private lands owned by Muslims. The section in question, entitled "An important request concerning the ruling [*ḥukm*] over the sultanic lands of Egypt and Syria," began where Ibn Nujaym had left off a couple of centuries earlier:[27]

> The sultanic lands of Egypt and Syria were originally [*fi-l-aṣl*] *kharājiyya,* but not anymore. It has been stated in [Ibn al-Humām's] *Fatḥ al-qadīr* that what is extracted [*ma'khūdh*] from the land in Egypt now is the rent [*ujra*] rather than the *kharāj.* So [Ibn al-Humām] noted: Don't you see that [the land in Egypt] is not owned by the farmers [*laysat mamlūka li-l-zurrā'*], but became the ownership of *bayt al-māl* because of the death of proprietors with no heirs [*mawt al-mālikīn bilā wārith*][?]. And the same applies to the lands in Syria, as it was stated in *Jihād sharḥ al-multaqa,* but the fact that it all became the [property of] *bayt al-māl* is an issue [*baḥth*] we shall deal with in [book 4 in] the chapter on the *'ushr* and the *kharāj* ...[28] And since it belongs to *bayt al-māl,* the *kharāj* could not be imposed on it anymore;[29] as to whether the

27. Ibn 'Ābidīn, *Radd,* 2:326-334: "*Maṭlab muhim fi ḥukm arāḍī Miṣr wa-al-Shām al-sulṭāniyya.*"

28. For a discussion of this chapter, see below.

29. Ibn 'Ābidīn later admits (see below), however, that what the peasants—as "tenant-farmers"—were paying to the state as "rent" was an equivalent to a *kharāj muqāsama.* In the Ottoman terminology, which Ibn 'Ābidīn seems to be deliberately avoiding, the "rent" was an equivalent to the *māl mīrī,* even though it was officially referred to as a "tax."

> farmers should pay the *'ushr* or not is an issue we will discuss in that chapter too (2:326).[30]

The legal fiction of the *kharāj* proprietors dying without heirs was probably first constructed, as the above passage mentioned, by the Egyptian Mamlūk muftī Ibn al-Humām, but it took shape in a more modern form, and adapted to the Ottoman conditions of the sixteenth century, with Ibn Nujaym.[31] In one of his *rasā'il,* entitled "al-Tuḥfa al-marḍiyya fi-l-arāḍī al-Miṣriyya,"[32] and relying heavily on what his Mamlūk predecessor, the Egyptian muftī Ibn al-Humām, already suggested, Ibn Nujaym has rooted his arguments, which basically legitimized the massive state ownership of the majority of rural lands, in the notion that "the imām was appointed an administrator for the general welfare of the Muslims [*al-imām nuṣṣiba nāẓir-an li-maṣāliḥ al-Muslimīn*]."[33] Combined with the role of "administrator" (*nāẓir*) was that of "guardian" (*waṣī*) over orphans. Thus, the image of the ruler conveyed through such representations was that of a guardian over his orphans, where the *ra'iyya* were the ones supposed to be in the position of "orphans," thus implying also that they were "minors [*qāṣirūn*]." What is of interest here is this "bringing together" of representations—the political and economic—which in many societies are kept separate. Needless to say that the image of the guardian placed the imām—or sultan in the Ottoman case—in the position of a shepherd who had an absolute rule over his flock. Not only did it imply an absolute attitude

30. Ibn 'Ābidīn, *Radd al-muḥtār,* 2:326. It is not possible in this context to take into account the process of adjudication between opinions that Ibn 'Ābidīn devoted himself to. Only his own opinion, whether conforming to *taqlīd* or *tajdīd,* will be noted.

31. Despite its importance, this is not a widely discussed topic, with the notable exception of Baber Johansen, *The Islamic Law on Land Tax and Rent. The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988); and, Kenneth M. Cuno "Was the Land of Ottoman Syria *Miri* or *Milk?* An Examination of Juridical Differences within the Hanafi School," *Studia Islamica* 1 (81 1995): 121-152. Needless to say, I disagree with both assessments regarding the nature of "change" in Ottoman Ḥanafism and do not see much of a "correspondence" between the jurists' reformulations of old classical concepts, and the new realities created by the Ottoman land-tenure system. Indeed, it is more realistic for analytic purposes to begin with the incongruity between the juristic discourse and other discursive levels, and then ponder on the difficulties that jurists faced when attempting to formulate the Ottoman land-tenure system.

32. Because the edited version of *Rasā'il Ibn Nujaym* (Beirut: Dār al-Kutub al-'Ilmiyya, 1980) is at times unreliable, I compared it with one of the available manuscripts: Zayn ad-Dīn b. Ibrāhīm Ibn Nujaym, "Kitāb al-rasā'il al-zayniyyah fī madhhab al-Ḥanafiyya," MS 8252, microfiche 8729 (Damascus: The Asad National Library), copying completed by a scribe on 14 Ramaḍān 1029/August 13, 1620, and the *rasā'il* are ordered differently from other available manuscripts; the forty-third *risāla* on the legal fiction of the death of the *kharāj*-payer, is to be found on folios 103-109; the same *risāla* is numbered six in the *Rasā'il,* 50-64 (drafted in 958/1551).

33. Ibn Nujaym, "Kitāb al-rasā'il," 104a.

of submission, but equally important was the absolute right that the sultan enjoyed over his subjects, primarily in their right to own or not own, and what should be left out as state property. In fact, the exclusive right, enjoyed by the sultan only, to take care of the orphans' interests was mainly related to "managing" their properties: the conflict, which Ibn Nujaym had indicated, between the early jurists (*mutaqaddimūm*) and the later ones (*muta'akhkhirūn*) was on the degree of freedom the sultan should have enjoyed while assuming his duties as guardian to the *ra'iyya.* Thus, while the early jurists were of the opinion that the imām should be given absolute authority to "freely sell [*al-bay' muṭlaq-an*]" whatever he pleases of the properties of his subjects, later opinions were much more restrictive and took the parallel between sultan and guardian almost literally. Following the basic sharī'a rules on the guardian's rights over the properties of his orphan, the late jurists suggested that the sultan-as-guardian should not sell anything unless the deceased person (who left the properties to his heirs and appointed the guardian) was heavily indebted, or unless the selling of the property, its exchange, or rent, would be beneficial to the orphan. Such restrictions, placed by later jurists, and known as the "seven questions [*al-masā'il al-sab'*]" (4:183), because they placed seven conditions on the selling of an orphan's properties, would have indeed constituted one of the signs of dissatisfaction that was manifested towards the massive state ownership of rural lands: Ibn al-Humām went as far as to request that the selling of "*kharāj*-lands" should only come out of necessity and conform, by "interpretation" (*takhrīj-an*), to the rules which a guardian had to follow concerning the selling of his orphan's properties: in other words, the symbolic guardian of the *umma*'s properties was now requested, by a late generation of jurists, to become an empirical guardian whose bookkeeping activity was to be controlled by jurists.

Interestingly, if the sultan decided to buy for himself one of those properties whose ownership was transferred to the treasury, "he had first to order someone else to sell it, and then purchase it from [the buyer] for himself."[34] Some court cases do indicate that this was too a common procedure among (real) guardians in particular when a deceased person, who had appointed a guardian to overlook the properties s/he had left for his/her children, was heavily in debt (C 5-2 *infra*). Since the guardian was typically one close to the family, if not from within the family, he would purchase for himself at least one of the orphan's properties in order to enhance the financial status of the latter; but that was done, however, in a way similar to what Ibn Nujaym prescribed for the sultan: first, the guardian would sell the property through an

34. Ibn Nujaym, "Kitāb al-rasā'il," 104b.

intermediary from which he would then buy it for himself. In fact, Ibn ʿĀbidīn had also posited the role of an "intermediary" as mandatory and noted how the jurists' positions oscillated between those who gave the imām a "general guardianship [*wilāya ʿāmma*]" (4:182) and others who limited his freedom within the borderline of the "seven conditions." The purpose was to establish the sultan as a guardian who did *not* own the properties of *bayt al-māl.* Thus, the sultan was someone who did own properties, but those were independent from those "belonging" to the *raʿāyā*-as-orphans: he only "took care" of their properties without himself owning them. The sultan-as-shepherd to the *umma* was therefore not to be directly identified with the properties that in principle belonged to the treasury only.

A person who purchased a property from the treasury should have the right to own it as *milk,* and he would bequeath it as waqf with his own specific conditions. Furthermore, once the imām-as-guardian decided to sell a property, he *ipso facto* lost the right to impose upon it the *kharāj* or *ʿushr:* the price of purchase, described by Ibn ʿĀbidīn as "the equivalent of ownership [*badal ʿaynu-hā:* compensation for the tangible thing]," replaced either the *kharāj* or *ʿushr.* On another occasion, Ibn ʿĀbidīn points out that once an old *kharāj* land was transferred to the sultan, and sold by him to an individual, "then the latter should not be subjected to the *kharāj* because the imām has already extracted the *badal* for the Muslims" (4:178), implying that since previous owners already paid enough *kharāj* over the years, the new owner did not have to go through this special land-tax. This owner will therefore not even be subjected to the commonly extracted "taxes" for such properties. The logic here could well be that the proprietor, having had already paid his dues to the state by purchasing a property, was exempted from additional "taxes."[35] The others, Muslims and non-Muslims, who at the moment of the early conquests, were either *given* their lands by the conquerors or had their rights as private landowners firmly established and approved: in either case, they had to pay either the *kharāj* or the *ʿushr* (but not both) as a "counter-gift" for what the state had already given them.

Jurists were quick to point out that the act of purchasing a property from the treasury and then bequeathing it into a waqf, established for those buyers rights that were significantly different from those "sultans, princes, or emirs" who were granted waqf lands by the sultan on the basis of an *iqṭāʿ* assignment: that is, "the kharāj is perceived [by whom the land was granted

35. It is not clear whether such an ambiguous statement implied a no-tax-forever policy, or that only the person who purchased the land was exempt from taxes; his heirs or future owners would have to follow the regular taxation system.

to, the assignee] while its ownership [*'aynu-hā*] remains to the treasury. [If the assignee bequeaths it as a waqf], his waqf is invalid and its conditions should not be applied; the opposite would have applied had he owned it first and then erected it as waqf" (4:183). Thus the properties that were granted to the upper classes (princes, emirs, bureaucrats, *'ulamā',* etc.) did not pay the *kharāj* since that "tax" became their major source of revenue: they did extract it from their peasants, but kept it as their income. However, because these properties were not *milk,* and hence were not entitled to be bequeathed as waqfs with conditions established for future beneficiaries, they were technically known as having been *marṣūd,* that is, "assigned" to the élite groups of society: "the sultan takes out [*akhraja*] some waqfs from the treasury and allocates them to those who deserve them from the *'ulamā',* the learned persons [*ṭalaba:* students], and the like, as an assistance [*'awn*] to them based on their rights [*ḥaqq*] from the treasury" (4:184).[36]

The legal fiction of the death of the *kharāj*-payer thus cleared the way, at least in the Ottoman period, for accepting 1) the massive state land ownership, and 2) a new taxation—or rent?—system, and 3) the way taxes and rents were extracted. At another level, that of the early sixteenth-century qānūnnāme, a concerted effort was also deployed in an attempt to bring the new Ottoman taxation and rent system into "harmony" with classical Ḥanafism. But due to the incongruence that marked both systems, and which touched primarily upon the status of landed properties, such an effort came with all the corresponding terminological confusions:

> In the liva [of Damascus], the tithe [*'ushr*] of certain domains not [associated with the practice of] *deimous* [that is, fixed taxes in kind or cash] and which had their dues assessed on the basis of their produce, consists of grains, but the tithe on the *kharāj* [*el-'üṣrü 'an-il-harac*] is extracted on waqf properties,

36. Since those "allocated" waqfs were kept by élite groups over long generational lines, what becomes noticeable in nineteenth-century sharī'a court documents were attempts aimed at establishing these properties as the *milk* to whom they were granted to in the first place. Thus, for example, some of the Shihābī emirs and their "relatives," who managed close to a century of political hegemony in the difficult areas of Mount Lebanon, were still very active in court litigations right after their demise in the 1840s (see Chapter 5 *infra*). What the cases of the Shihābī emirs clearly establish was a pattern of property transfers—*formally* either *milk* or waqf—between the younger generations of the Shihābs and their elders. Helped by all kinds of legal devices, or *ḥiyal,* which were used with a great deal of artfulness, the Shihābs were able to consolidate, by means of fictitious litigations, their *ownership* rights on large domains and estates. What is of interest here is that because of the confusion that reigned, throughout the Ottoman period, and in particular during the nineteenth century (the period prior to the 1858 Land Code), over the status of rural properties as to whether they were "genuinely" waqf and *milk* or not, many attempted to establish their ownership rights, over properties that formally should have belonged to the treasury, through a formal and fictitious litigation process.

> because we say: "the tithe on the *kharāj*." This is why the lands of Syria are for the most part *kharāj* lands.[37]

Such a passage, part of an early sixteenth-century regulation from the imperial center, is typical in its confusing terminology. The confusion stems from the fact that old obsolete Ḥanafī notions are used in conjunction with a different historical context. Thus, the postulated hypothesis that the bulk of Syrian lands, back in the sixteenth century, was *"kharāj"* only makes sense if we assume that the implication here is that they were the "equivalent" to state-owned *mīrī* lands. The bulk of the *kharāj* lands, according to the fiction outlined above, which were traditionally owned by non-Muslims, were confiscated by the state, and hence came under the sultan's guardianship, because their "owners" died without heir. Moreover, the expression "the *'ushr* on the *kharāj*" only makes sense if we assume beforehand that the "Ottoman *kharāj*" was nothing but the *mīrī,* some of which might have already been granted as waqf (which, in turn, became the sultan's waqf bequeathed to large urban areas for the sake of enhancing the prestige of the ruling dynasty). In short, "the *'ushr* on the *kharāj*" was therefore nothing but the *māl mīrī* or the "tax"-cum-"rent" based on the area of cultivation (rather than in proportion to the produce),[38] and hence was not a flat land-tax (unlike the original *kharāj*).

However, the surprising element in this unfolding drama over property ownership and taxes was more the position of the sixteenth-century Ottoman muftīs in Istanbul than their Arab and "Syrian" counterparts. For one thing, the language of the former was much more explicit and open to changes that occurred in the types of ownership, rent, and taxes: things were named by their new names and the old obsolete language was adapted to the new realities of the Ottoman land-tenure system. For another, the early Ottoman muftīs did not limit themselves to the death of the kharāj-payer, and instead went ahead with their new terminology and fatwās that identified the new phenomena. One such example was that of the muftī Kemalpashazade (d. 1534):

> When the Sultan's agents registered the provinces, they assigned the land as fiefs (*iqta'*). The right to settle on and enjoy the usufruct of the fiefs was given to cavalrymen (*sipahi*) in the form of *timar* revenue. In these realms, this category of land is called *miri.* The holder of the fief (*timar*) is entitled to the right of settlement by letters patent (*berat*) or license (*tezkere*). He sells the use of his land to his peasants (*re'aya*) and cultivators, taking from them his customary dues and canonical taxes.

37. Robert Mantran and Jean Sauvaget, *Règlements fiscaux ottomans: Les provinces syriennes* (Damascus: Institut Français de Damas, 1951), 7.

38. Calculations based on the produce become important only in a competitive environment where sales are generally in cash.

> Since neither the fief-holders nor the occupiers own the essence (*asl*) or the substance (*raqaba*) of the land, sale, gift, and conversion to trust are not permissible, although lease and loan are.[39]

This line of thought has been articulated even more forcefully by the muftī Ebu's-su'ud:

> The [Ottoman] tithe is not the [canonical] tithe (*'ushr*). To call it "tithe" is a gross deception by the common people. *Miri* is tribute land: it cannot possibly be tithe land. The share that is paid is proportional tribute. It is the cavalryman's canonical right.
>
> Tithe lands are the districts [around] the Mighty Ka'ba. The tithe from there is given to the poor.[40]

That kind of clear-cut language was totally absent in the texts of the jurists in Greater Syria throughout Ottoman times.[41] If as Ebu's-su'ud correctly noted. that identifying the canonical *'ushr* with the Ottoman tithe was plain nonsense and "a gross deception to the common people," why then did the jurists in the Syrian provinces kept deceiving themselves, and what was the usefulness in keeping up with the obsolete canonical language while identifying new phenomena with words that did not belong to them anymore? Why was an adherence to the past more crucial than an opening to the present?

For one thing, a perseverance over the line inaugurated by the Ottoman muftīs would have required more radical steps than hitherto anticipated. In effect, not only major historical phenomena would have to be identified with the right words and concepts, but notions of property, rent, and contract—or, more accurately, the law of property and the law of contract—would have to be re-elaborated while acknowledging the rupture with the past. That would also not have been enough, had the classical notions on contracts and obligations not been questioned accordingly. Finally, and this is the main point, the religious courts played a minor role in lawsuits regarding *mīrī* lands—that was mostly left to the care of the regional councils. Readapting their doctrine to modern times on matters outside their jurisdiction was therefore simply not worth the effort. Moreover, while legal doctrine remained pretty much anchored in its

39. Quoted in Colin Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997), 120.

40. Quoted in Imber, *Ebu's-su'ud,* 125.

41. Our selection of texts is not limited to *uṣūl* and *mutūn* texts, and considering that the *Radd* itself represents a *shurūḥ* manual par excellence, in which Ibn 'Ābidīn had integrated some of his most well known fatwās, our assessment will become even more obvious once sharī'a court cases are fully explored together with the minutes of the regional councils and the sultanic firmans.

classical notions, the sharī'a courts for their part worked their way through the new Ottoman land tenure system by means of procedural fictions, thus attempting to bypass the limitations of the law of contract. In fact, the Ḥanafī law of contract, in its elaboration of a large number of contracts (which was also its point of weakness), was much more elaborated and took precedence over the law of property, while procedural fictions were nothing but contractual settlements over property rights (see Chapter 3 *supra*). Remarkably, then, what should have emerged as a "gap" between Ḥanafī legal doctrine, on the one hand, and the practices of the courts, on the other, only led to a wide array of procedural fictions whose role was precisely to keep legal doctrine at bay from any conceptual changes. In the meantime, conflicts relegated to mīrī lands fell within the jurisdiction of the regional councils, thus inaugurating a parallel system of judicial decision-making to the courts.[42] Ḥanafī scholars thus kept themselves entrenched within their own communities, accepting major changes only reluctantly as *maṣāliḥ mursalah,* that is to say, as practices imposed in corrupt times and that were neither prohibited—their prohibition would have endangered the livelihood of common people—nor particularly recommended.[43] In the meantime, as already noted in the previous chapter, all practices that were only marginally integrated within Ḥanafī practice—that is, without much substantially affecting the law of contract—were so on the basis of their customary nature, even though many were the outcome of an imposed Ottoman land-tenure system. By the 1860s, with the wave of the commercialization of land that swept the Syrian provinces, and the need for new notions of property and contract, the sharī'a system had already become mostly obsolete and was relegated to personal status matters and the like.

In the texts that follow, therefore, the old categories of *'ushr* and *kharāj* should not be taken as totally "out of context," assuming that such an assertion would mean anything here, since the judicial decision-making process of the sharī'a courts, which developed all kinds of procedural fictions, was still nevertheless operating in conjunction with Ḥanafī legal doctrine. In other words, the *fictional* nature of many of the procedures was an indication of a legal doctrine unable to bypass some of the already obsolete canonical formulations.[44]

Since the Ḥanafī fiqh that developed in the Syrian provinces (and Egypt too) never fully dropped *kharāj* as a tax category, and kept dealing with it

42. See Chapter 9 *infra.*

43. Zarqā', *Madkhal,* 2:937-8.

44. See Table 2-2 *supra.*

extensively,[45] it could well be that what was *really* meant by *kharājī* were *timār* or *mīrī* lands, while the *'ushr,* which was originally the tithe imposed on private lands, was translated into a tithe imposed on state-owned domains in general. At times, the existence of all these legal and fiscal categories side by side in the late Ḥanafī literature becomes more than confusing:

> [When a (private?) land] is irrigated with water [taxed on the basis of] *'ushr,* then it owes 'ushr dues; and when it is *kharāj* water, then it should owe *kharāj* dues, even though many villages and farms nowadays which are waqf pay to the *mīrī* half, or one-fourth, or one-tenth [of their produce]. ... [From our standpoint,] a land is considered *kharājī* when its people have not converted to Islam, whether it was conquered by force or not (4:178/9).

It is worth noting here that—surprisingly—very rarely did Ibn 'Ābidīn mention the dominant "rent" system of his time—the *iltizām-mīrī,* and when he does, as in the above passage, he avoids even a minimal elaboration as to what the system meant to Ḥanafī practice. The *mīrī* dues were vaguely referred to, on some occasions, as *gharāmāt,* while the *multazim*s were the *ḥukkām al-siyāsa,* and all this with the insistence that the only legitimate dues were the *'ushr* and *kharāj*. Theoretically, however, with the *kharāj* having become in practice marginalized (except perhaps for its "ideological" value), the mīrī should have been the *'ushr*'s legitimate heir as a "tax" or tithe based on one-tenth of the produce. But the *mīrī,* like the *timār* before it, was soon to become much more than the one-tenth of the produce: as Ibn 'Ābidīn rightly pointed out, it could have been as much as one-half, if not more. In other words, the *mīrī* was no longer a "tax" on the produce but looked more like a "rent," while the peasants, forced into corvée labor, were paying their dues to the state in exchange for their "rights for using the lands." And with the "intermediary" person of the multazim who imposed himself between the farmer and the state, who owned the land *de facto,* the *iltizām* system was transformed into a system for collecting "rents" rather than "taxes."

This is why Ibn 'Ābidīn's text seems to be faltering and desperately ambiguous most of the time, in particular when describing the land-tenure system of his time. Remarkably, there was a realization on his part—and this was already established in the Ḥanafī literature of the Ottoman period—that

45. Contrary to many assumptions in contemporary scholarship, see, for example, Th. W. Juynboll, "Kharādj," *Shorter Encyclopedia of Islam* (Leiden-New York: E.J. Brill, 1991), 245: "In the later *fiḳh*-books we therefore only find the regulations regarding the poll-tax still given in detail, while those for the kharādj are only dealt with cursorily or even not at all. Only in al-Māwardī's special work on the Muslim system of administration do we find the regulations for the kharādj still dealt with in considerable detail." Well, apparently, a late jurist like Ibn 'Ābidīn was at least as much obsessed with *kharāj* as Māwardī.

what the state was extracting from its own domains was no longer the classical "taxes" of *'ushr* and *kharāj,* but more likely a "rent" (*ujra*) (the designations of "tax" and "rent" pose more problems than they solve, and we need to keep in mind that they represent modern connotations, from the eighteenth century and later—as part of a Western political economy discourse—with meanings different from the ones we have assigned to them thus far):

> [The lands of Egypt and Syria] pay an *ujra*[46] rather than the *kharāj*.[47] ... The imām leases [a state-owned *mīrī* land] and delivers all its rent to the treasury, like a home which has become the property of the treasury, and which the sultan has decided to exploit [*istighlāl*].[48] And if he decides to sell [a land], he can do so either without restriction [*muṭlaq:* absolute] or else for a particular need [*ḥāja*]. It has thus been established that the selling of the Egyptian and Syrian lands is absolutely valid [*ṣaḥīḥ muṭlaq-an*] either from their owners [*mālik*] or from the sultan. If a land was sold from its proprietor, it would then have been transferred with its *kharāj* dues [meaning that the one who purchased it would have to pay the *kharāj*],[49] and if the sultan was the one who sold it, this would have been either because its owner was incapable of cultivating it or because he died [without heir]. We have already argued that it becomes the treasury's property and is no longer subject to the *kharāj*. Thus, once the imām sells it, the buyer, whether he transforms it into a waqf or keeps it as such, should not pay the kharāj.
>
> I argued that [this kind of land] is of a third kind,[50] referred to as *arāḍī al-mamlaka wa arāḍī al-ḥawz,*[51] since it is neither *'ushrī* nor *kharājī*. [This special category includes the lands of all] those who died without heir and went to

46. That is, the *māl mīrī* in the official Ottoman terminology.

47. This should have in principle included the 'ushr also; but, considering that most conquered lands were assigned as kharājī, and that in early Islamic history, Muslims were a minority, the kharāj became the reference to taxation; the kharāj, and more specifically its dominant form, the *kharāj muqāsama,* was roughly one-sixth to a fifth of the produce, hence twice as much as the 'ushr (Ibn Nujaym, *Rasā'il,* 62). Such factors, showing the overwhelming importance of the kharāj over the 'ushr, could explain why Ottoman jurists and officials compared it to the māl mīrī—despite the fact that the kharāj was never considered an ujra by early jurists.

48. The notion of *mu'add li-l-istighlāl* or *li-l-ījār* implies that the proprietor has given up on the *'ayn* of his property (*istaghna 'an 'ayn-ih*) and decided to lease it, so that whenever the tenant decides to give up on the lease, the property is leased to another tenant.

49. What about lands which were 'ushr and which were purchased or transferred or inherited? Why did Ibn 'Ābidīn limit himself to kharāj lands?

50. That is, the *arāḍī amīriyya,* often shortened to mīrī in the official Ottoman documents, including the sharī'a courts and the majālis of the Tanẓīmāt.

51. It is not clear what the historical or linguistic origins of the term are: the root of *ḥawz* could well be *ḥāza,* to hold, possess, or own; and take or gain possession of. *Ḥawz* refers also to a locality (*nāḥiya* or *mawḍi'*); thus, *arāḍī al-ḥawz* were the acquired mīrī lands by the state.

> the treasury or were conquered by force. [There is a general consensus] that the imām [could exploit the land] in two ways. Either by placing the farmers [*zurrā'*] in lieu of the owners [*maqām al-mallāk*] to cultivate and pay the kharāj, or in giving it to them as a lease for an amount equal to the kharāj. [In both cases,] the imām would have extracted the kharāj, and when [the amount paid] is in cash [*darāhim*], it is *kharāj muwaẓẓaf,* and when it is part of the produce [that is, in kind], then it is *kharāj muqāsama* [partnership].[52] But concerning the right of leasing [*ḥaqq al-ikrā'*],[53] it should consist of a rent [*ujra*] and nothing more with no 'ushr and no kharāj.[54] So when there is an indication [*dalīl*] that the two taxes [*mu'nat-ayn*] of 'ushr and kharāj are not necessary [*'adam luzūm*] in *arāḍī al-mamlaka wa-l-ḥawz,* only a rent should be imposed (4:179).

The above passage, which accepts once more the legal fiction of the state's "legitimate" claim over mīrī lands, comes close into looking at the Ottoman land-tenure system in terms of its most fundamental reality: that it was indeed more of a rent-control system rather than of a taxation on the produce. Once kharājī-proprietors died without an heir, their lands became the state's property. Following that legal fiction, three different methods for farming out "mīrī" lands were possible: either treat the farmers as "landowners" and extract the kharāj—that is, mīrī—from them, or have them assume the role of sharecroppers, or else give them a lease equivalent to the kharāj. In the first two cases, since the kharāj was extracted *after* the production cycle was completed, it was perceived either in cash or kind, depending on prior arrangements between the farmers and the state authorities (or their intermediaries, the multazims), while in the third case, the state behaved more as a true landowner, leased the land, and was paid a rent for doing so. Ibn 'Ābidīn did insist that no "tax" should be imposed in addition to the "rent" since it made no sense that the same agency—the state—perceived both rent and tax. We thus end up with three possibilities:

52. This distinction goes back to Abū Yūsuf in *Kitāb al-kharāj*.

53. The *kirā'* is the tenant's rent, or the pay (salary) of a hired person.

54. The assumption here is that all leased lands were mīrī. Once their ujra was paid by the tenant-farmer to the treasury, they should owe no more additional "taxes," either 'ushr or kharāj. In the case of privately owned lands, the ujra was—in principle—paid by the tenant-farmer to his landlord, who, in turn, would pay the 'ushr or kharāj to the state. For this "special third category" of lands, which was state-owned, each land had either to pay one of the two forms of kharāj, or be rented and no longer subject to any additional "tax" since the "rent" paid to the state was in lieu of any "tax": in short, tax and rent would overlap and become indistinguishable. But then, in this case, the "rent" itself would be assessed on the basis of what the kharāj was, that is, the rent effectively *replaced* the kharāj.

Table 4-1
Old taxation system

	Status of the peasantry	Paid dues	Method of payment (to the treasury)
1	The peasants would act *as if* they "owned" the land and would thus have to pay the state a specific tax.	*kharāj muwaẓẓaf,* a "tax" paid in cash, sort of direct land-tax.	*kharāj* in cash, that is, a fixed sum of money whose amount depended on the size and quality of the land (but not on the produce).
2	The peasants would act as sharecroppers, paying as "tax" a fixed percentage of the crop in kind.	*kharāj muqāsama,* a "tax" paid in kind. Close in some respects to the Ottoman *māl mīrī.*	*kharāj*-in-kind, based on the yield, between one-fifth and one-sixth of the produce; and, in this respect, looks more like the *'ushr* (which in principle was no more than one-tenth) than a land-tax.
3	The peasants would act as the state's tenants.	an *ujra* equivalent in effect to the *kharāj,* but no additional taxes. Closest of the three to the Ottoman māl mīrī "rent" system.	Rent (cash or kind? or a combination of both?).

Commentary: The classical system of taxation, which supposedly had consolidated in the first two centuries of 'Abbāsid rule (as epitomized in Abū Yūsuf's *Kitāb al-kharāj*), and which probably began to deteriorate with the Būyids takeover of Baghdād in 945, was a system—at least compared to the ones to follow—that heavily relied more on a central bureaucracy and less on the usual intermediary figures of elders, notables, tax-farmers and rural landowners (which in some instances consolidated into quasi-castes). Those social conditions allegedly enabled the state to tax its peasantry more "fairly"—without the abuse of intermediary figures—while avoiding corvées and keeping an eye on the production cycle of the lands that were confiscated from the previous (mostly Christian) landowners (particularly in the Sawād). However, beginning with the weakening of the 'Abbāsids in 945, if not before, and the excessive militarization and fragmentation of the central authority that will follow, beginning with the Būyids, Seljūqs, Mongols, and up to the Mamlūks and Ottomans, the power of the intermediaries will gradually increase in the form of *a'yān* and *amīrs.* The peasantry will thus find itself in the awkward position of producing more while keeping less.

Of all three models, only the third comes close to the Ottoman *māl mīrī* system, even though Ibn 'Ābidīn seems in favor of the *kharāj muqāsama* model, which on its own confuses more than it enlightens. In fact, the *kharāj muqāsama* was, in the words of Ibn Nujaym, "between one-sixth and the fifth [of the produce, and, in this respect,] is like the 'ushr because it requires actual cultivation [*al-zirā'a ḥaqīqat-an*], and it is not enough that it could be simply afforded [*lā yakfī al-tamakkun li-wujūbi-hi*]."[55] In other words, unlike the

55. Ibn Nujaym, *Rasā'il,* 62.

kharāj muwaẓẓaf, which was limited to a fixed sum of money whose amount varied with the size and quality of the land, the *kharāj muqāsama* was tied to a fraction of the produce; and unless the land was effectively cultivated, an assessment of that kind would have been impossible. In this respect—and in this respect only—the *kharāj muqāsama* was probably the closest "tax" of the Ottoman *māl mīrī* system. But even that kind of comparison, adopted by Ibn ʿĀbidīn and other jurists, has its own problems. For one thing, the *māl mīrī,* which at times was equivalent to over half of the produce, could hardly be looked upon as a "tax."

Moreover, Ibn ʿĀbidīn's discourse leaves out the most critical problem faced by the Ḥanafī jurists of the Empire: namely, that transferring the notion of *kharāj* (or *ʿushr* for that matter) to state-owned lands undermined the credibility of some of the most profound legal concepts of the early Ḥanafī literature—the fact that such lands were in principle *"privately"* owned by individuals who could rent, sell, transfer, and inherit them.[56] Furthermore, Ibn ʿĀbidīn's discourse, having understated that major conflict in the early literature, described very inadequately what was going on in the land-tenure system of the Empire and deliberately omitted its terminology. In the early *timār* system, state-owned lands were granted to *sipāhi*s and the peasants were for the most part under corvée. What the *sipāhi* was in reality extracting was not a "tax" equivalent, which in one way or another would have formed the equivalent to the old *kharāj/ʿushr* dues, but a full "rent" generally consisting of as much of the yield as possible. When by the seventeenth century, the *iltizām* became the dominant system for farming out state domains, the *multazim* assumed the civil role of the *sipāhi* but still played the same basic role: that of extracting as much "rent" as possible from the peasantry. In fact, in both systems, the "rent" was usually perceived in kind—what the Ḥanafī texts referred to under the euphemism of *kharāj muqāsama,* even though it was not strictly speaking a land-tax anymore and unrelated to the *kharāj per se*—and commonly referred to as the *māl mīrī.* Chances were that lands that did not fit under the mīrī were usually waqf. But even though waqfs were originally privately owned properties, their *mutawallī*s could not lease them with competitive *ujra*s because that was not accepted practice. Instead, like mīrī lands, they had to be farmed out to individual multazims who followed the same procedures as for mīrī lands in general, thus considerably reducing the waqf's cash flow.

56. Even though that was explicitly stated as such in Abū Yūsuf's *Kitāb al-kharāj,* the notions of *milk* and *tamalluk* were distant from their modern connotations of "absolute and inalienable ownership," and should therefore be understood relative to the feudal meanings of early Islam, namely as properties that belonged to the community of Muslims, but whose "possession" was in the hands of private "individuals."

Furthermore, the general decline in the value of rents, already encountered in Chapter 3, and which seems to have lasted for at least two centuries, must be linked, for analytic purposes, with all the lump sums and "unnamed contracts"—or more adequately the "real rent"—which each new tenant had to worry about in order to have access to all those "tenancy privileges," all of which instituted special "status contracts." The latter acted like barriers that only those who could have afforded the preliminary lump-sum payments were able to overcome. Overall the non-competitive nature of the hire market only contributed in lowering the value of rent and the flourishing of an endless array of special privilege contracts.

Ibn ʿĀbidīn's own attitude was only meant to be congruent with his school irrespective of the realities on the ground: 1) He had to link all the Ottoman fiscal notions, while seldom referring to them directly by their names, with the canon; 2) for the Ottoman period, he very rarely named things by their name (*mīrī, iltizām, multazim,* etc.), and when he did so on a few rare occasions, the corresponding notions or phenomena were not clearly articulated in any way that would prove valuable; finally, 3) the system as a whole is severely criticized,[57] while, on the other hand, it is de facto provided with its own legitimate legal foundations (for example, on the fiction of the death of the kharāj-payer). On both grounds, however, he follows the tradition, mainly in its attempts to keep itself autonomous from political power and the household of the sultan.

This is even more obvious in the specifics of Ibn ʿĀbidīn's text, which probably needs to be read at two levels, one where a manifest attempt was made to interpret current land practices with the eyes of the old Ḥanafī masters, and a second level where the preliminary outcome of the first reading needs to be challenged with outside evidence—other discursive levels—on the empirical realities of the land tenure system. Consider, for example, the status of farmers (*zurrāʿ*) and the type of payments they should have been subjected to. Ibn ʿĀbidīn maintains that "the farmers have nothing to pay in terms of *ʿushr* and *kharāj*" (4:179): the assumption here was either that such "taxes" were to be paid by the landowners, or else that the farmers were already under a *kharāj muqāsama* contract, thus paying part of their produce for their right of using the land, and were thus under no obligation to pay extra taxes in addition to the regular *ujra.* But, he then adds, that "what is here extracted is not a rent strictly speaking [*al-ma'khūdh laysa ujra min kul wajh*] because that is only the legal *kharāj*[58] of the imām; and a *ʿushr* cannot be added to a *kharāj* ..." (4:179). The

57. See in this respect the severe criticisms against judges, *multazim*s, and waqf administrators already described in previous chapters.

58. Or the *kharāj muqāsama;* or the *ujra*—the *māl mīrī* in Ottoman official documents.

"legal *kharāj*" is to be taken here in the strict sense of a portion of the produce that the peasantry transferred to the sultan's treasury—or what the early Ottomans referred to as the *çift-hane,* a system of "household" production where "taxes" were not collected by intermediaries. So what the farmers were paying to the treasury was an *ujra* ("rent" for using a land they did not own) equivalent to a *kharāj muqāsama.* But Ibn ʿĀbidīn's insistence in keeping the old terminology of his predecessors only confuses the issue since what the state was extracting from its peasants was much more than a land-tax or a tax estimated on the basis of the volume of the produce—indeed, it was a full rent. Having forced himself to think in terms of classical doctrine, Ibn ʿĀbidīn still perceived the *kharāj* and *ʿushr* as dues on the landowners, so when the state poses itself as the sole proprietor, such "taxes" ceased to exist—at least in their old connotations—and what was thus extracted from the peasants was a "quasi-rent" "equivalent" to a *kharāj muqāsama:*

> It was said in the *Isʿāf* [*fi aḥkām al-awqāf*] that when the *mutawallī* [of a waqf] gives the land as a sharecropping contract [*muzāraʿa*], then the *kharāj* and *ʿushr* are [paid] from the revenues of the waqf's beneficiaries [*ḥiṣṣat ahl al-waqf*] because [the association] is a full rent [*ijārat maʿna*]. Similarly, I think that when a land belongs to the treasury, and is given in [a sharecropping] association to the farmers, what is extracted from them is a rent equivalent [*badal ijāra*] rather than the *kharāj* (4:179).

Again, another confusing passage. As our previously examined sharecropping cases show (C 3-11 & 3-12), contractual settlements through procedural fictions were free of the jargon of the *ʿushr* and *kharāj* altogether. There was, to begin with, a regular low rent, to which one percent of the produce was added as a readjustment in kind. It is unfortunate, however, to compare that kind of a situation to one where peasants were working on *mīrī* lands and were paying either part of their produce as *ujra,* or else had a "rent" extracted by intermediaries. In effect, it is a long a stretch of the imagination to perceive either the old *kharāj muqāsama* or the *mīrī* dues as "sharecropping" situations. To begin with, what was extracted exceeded by far the normally "shared" produce in most sharecropping contracts. Second, the majority of peasants were only nominally "tenants" and had to produce excessively to meet demand.

Our faqīh then comments later that when in a *muzāraʿa* contact between state and peasants, in which one-fourth to one-third of the produce was extracted as a "rent equivalent," such contracts were "invalid because of the ignorance [of those involved]" (*ibid.*). Since the *kharāj* was prohibited by law on lands whose landowners died without heir and which became state property, what was then collected in a "sharecropping contract" was a "semblance of a rent rather than a true one [*maʿna al-ijāra lā ijāra ḥaqīqa*]" (4:180). Again, the real

issue here is whether it is appropriate to describe the "contracts," assuming there were any, between the state and the peasantry as ones of "sharecropping" when even one-third of the produce seems an optimistic requirement at best. Sharecropping should by all means be looked upon as "private" contracts only, and usually limited to waqfs as a way to readjust the rent. When privately owned lands were leased on the basis of a share of the produce, those used to be on an association of one-fourth of the latter, a contract better known as *murāba'a.*

Keeping one's hand over a property

Because the mīrī was state owned and "assigned" to farmers and multazims for exploitation, some of them became the *de facto* owners. When studying court records—particularly those of the nineteenth century, a period of increasing land commercialization—one *suspects* that such conversions, from one type of property to another, became routinized through procedural fictions: 1) the combination of such legal notions as *waḍ' yad* ("occupation") and *taṣarruf* ("usufruct"), which enabled farmers, *multazim*s, and *muqāṭa'jī* families working on public lands (or hiring laborers to do the work for them) to *later* claim in court the title of full "ownership" through simulated contractual settlements; 2) a settlement over the administration of a waqf *de facto* implied the recognition of the status of all its properties, even though there seldom was any "hard evidence" that the latter were "originally" privately owned (see Chapter 6 *infra*); and 3) the Ḥanafī notion of "occupation" (*waḍ' yad*) made the process of property conversion, from one status to another, even more versatile. since it managed to bypass all "original" claims of ownership to the property.[59]

Ibn 'Ābidīn thus maintains that lands known as *arāḍī al-mamlaka,* whenever in the "hands of their farmers, should not be taken from them as long as they were paying their dues" (4:180). Even though such lands were neither inheritable nor purchasable, one would expect them to be transferable from father to son; otherwise, the property would go back to the treasury since a daughter's or a paternal uncle's right only produced "illegal contracts [*ijāra fāsida*]" (4:180). Furthermore, if a "person using the land [*mutaṣarrif*]" made a "bad use [*'aṭṭala-hā*]" of it, it should be withdrawn from him and granted to someone else.

59. In his "book of judging," Ibn 'Ābidīn acknowledges the unusual spread of fictitious litigations at an alarming rate, and requests from judges to declare a case null and void whenever they suspect that the case at hand is fictitious (Chapter 2 *supra*).

What was then the status of the peasantry? It seems that most of them did not even own their lands, worked under corvée, and paid the bulk of their produce as "rent" to the state—that is, the *māl mīrī,* or what the juristic discourse euphemistically referred to as *kharāj muqāsama,* or even more confusingly as a quasi-"sharecropping" arrangement. A privileged class of peasants, however, either "owned"—depending on how we understand "ownership"—its lands or else managed a special well-categorized status (e.g., *shaddād, murābi'*):

> The peasants's non-ownership of land is unknown to us in the Syrian lands [*al-arāḍī al-Shāmiyya*] except in the villages and farms which are either waqf or are known to belong to the treasury. As far as the other [lands] are concerned, we see them being inherited, and sold from one generation to the other. [In the section] on preemption [*shuf'a*] in [Ramlī's] *Fatāwā Khayriyya,* a question was raised concerning brothers who had lands with plantations, and a man who also had a planted land close by, all sharing the same road: If the man sells his land, so do the [brothers] enjoy [the right] to take it by preemption [*akhdhu-hā bi-l-shuf'a*] even though it was a kharājī [land]? And he replied: yes, they have the right to take it [buy it?] by preemption, even though it was a kharājī [land] because the kharāj is not in contradiction with *milk* [*al-kharāj lā yunāfi al-milk*]. [It was thus mentioned] in the *Tatrākhāniyya* and many of our school's books that the land [paying the] kharāj is [privately] owned [by individuals,] and so is 'ushrī land. They could be sold, turned into waqf, and be inherited like any other property; so preemption applies to it [*tuthbatu fihā al-shuf'a*]. As to the lands that became the property of the sultan and his treasury, and were assigned to individuals through [a contract of] sharecropping [*yadfa'u-hā li-l-nās muzāra'at-an*], these are not sold and the right of preemption does not apply to them. Thus, if a person occupies [*wāḍi' al-yad*] a [mīrī] land, claims that it is his property, and that he purchased it, or inherited it, or anything else that would prove that it was milk, and that he is paying its kharāj,[60] he must furnish evidence for such a claim. I mentioned this because [such incidents] occur frequently in our country [*balad*] ... (4:180).

The above passage finally bypasses all confusions:

1. *Kharāj* and *'ushr* lands imply full ownership (*milk*) in Ottoman times.
2. Those lands could be sold, transferred and inherited, bequeathed as waqf, or subject to preemption (*shuf'a*).
3. Their taxes, referred to in the classical literature as *'ushr* and *kharāj,* should be more appropriately identified as *māl mīrī.*
4. In the case of state-owned *mīrī* domains, the *māl mīrī* acts as the de facto "rent." The value of *mīrī* for both *milk* and *waqf* remains, however, uncertain.

60. That is the *kharāj muqāsama, ujra,* or *māl mīrī.*

5. "Sharecropping" as *muzāraʿa* is interchangeably used with *kharāj muqāsama* in the classical Ḥanafī texts, even though Ottoman sharecropping is of a different nature altogether (C 3-11 & 3-12 *supra*). In the final analysis, the *kharāj muqāsama* is nothing but the Ottoman *māl mīrī*.

As we shall see later, claims for evidence of "ownership" will eventually soften: "occupation (*waḍʿ yad*)" of a territory turns out to be enough evidence *per se* to establish "ownership." In fact, and, in principle, a legal "possession" of a territory requires evidence at two levels: first, that the "occupation" of the territory was not an act of usurpation (*ghaṣb*); in that case, the territory would be claimed by someone else; second, proof of "ownership" must also be presented, in particular if two or more have valid claims over the same territory. Land "ownership" might therefore require *both* types of evidence, unless "occupying" a land and cultivating it represent in and of themselves enough evidence. That proves to be a crucial issue because occupation-as-evidence is much softer than a full proof of ownership. In fact, even though in practice and in both cases, evidence invariably meant bringing two witnesses to court (written documents were seldom used), it was much easier presenting evidence for rights of occupation and possession: that came as an outcome of the ambiguous status of all mīrī lands possessed by individuals and families over long generational lines, but kept all along without clear ownership rights.

Considering that many of the cases that we shall examine in the coming chapters dealt with *suspicious* property transfers between family members (Chapter 5 & 6 *infra*), the question is whether checking how many were "genuine" transfers, or purchases, or inheritances from a deceased member of the family is feasible. Indeed, what we will be looking at is whether such procedural fictions were simply safe, and thus routinized devices to safeguard property rights between family members, or else reflect a more radical phenomenon, namely the possibility of a change of status, say, from mīrī to milk or waqf. In short, we are looking either at the possibility of straightforward conveyances that were transferred through procedural fictions, or else at a status modification. Such a task, however, proves quite difficult, and all what one could hope for is to present "enough" arguments that would at least eliminate some weak or false alternatives. In both cases, however, the real culprit is the absence of a well defined law of property to the point that the sharīʿa courts had to use the much more robust law of contract in all its variations[61] in order to grant the disputants their property rights. In fact,

61. See Chapters 3, 5 & 6.

when it came to Ibn ʿĀbidīn's own tortuous formulations, he seems to be pointing towards conflicts involving the right of possession and preemption of public lands, which might have been numerous considering that many of the disputants "occupied"[62] such lands and cultivated them over long periods of time, paid their dues to the state, and at some point felt that this was enough to declare the property as theirs.[63] Such legal actions, however, only became possible thanks to the confusing status of rural lands in general. The fact that many state-owned properties had their *taṣarruf* or iltizām rights transferred from one generation to another made them seem *as if* they were privately owned. What Ibn ʿĀbidīn left unclarified, however, was that the social actors, in conjunction with the sharīʿa court system, created several procedural fictions that made possible the establishment of many properties as privately owned. There was, indeed, a classical form for such lawsuits which only their repetitive nature makes their discovery possible. The two parties involved in the "litigation" were quite often from the same (restricted) family or clan, and "close" enough to each other: husband-wife, daughter-mother, father-son, brothers and sisters, were all common associations for such alleged disputes. Then, in a typical gesture characteristic of such cases, the plaintiff would make the claim that the defendant was enjoying an illegal "occupation" of his or her property. The defendant would then respond that she did in fact "purchase" the property from the plaintiff for a "known sum" which usually remained unspecified, and, instead of presenting the legal documents in proof of the transaction, the defendant would then bring two witnesses to court confirming the transaction. Thus, the defendant and his or her family (including, in some cases, the plaintiff), might end up with a property, which they proved was theirs through a process of *litigation,* which *might* have originally been state-owned or waqf.

> Some of the well formulated notions originate in the basic rules of the fiqh [*al-qawāʿid al-fiqhiyya*] such as having one's hand over [*waḍʿ yad:* occupation]

62. I consider "occupation" much weaker than "possession" in terms of granting property rights and the like.

63. "An important request concerning the fact that ʿushrī- or kharājī-lands, unlike state-owned lands, could be subject to preemption: We have put forward that the *arāḍī sulṭāniyya* are not subject to preemption; and it was mentioned in [Ramlī's] *Fatāwā Khayriyya* that the fact that a land was ʿushrī or kharājī does not in itself contradict milk. Indeed, many books assert that kharājī- and ʿushrī-lands are owned (*mamlūkah*), and they could be sold, bequeathed as waqf, and inherited; they could also be subject to preemption, in contrast to state-owned lands, which are subject to sharecropping and could not be sold, hence there is no preemption in them. So if an occupant (*wāḍiʿ yad*) claims that the land is his own, and that he is paying its kharāj, he should then present enough evidence [to prove his ownership]. I simply mentioned this because of its frequent occurrence in our province (*bilādu-nā*). We also said that preemption does not apply to lands subject to *ḥikr,* whose regime is different from that of the waqf" (Ibn ʿĀbidīn, *Radd,* 6:224).

> and the use [*taṣarruf*] [of a land]: these are among the strongest signs of property ownership [*aqwa mā yustadallu bihī ʻala al-milk*], so, [in this case,] witnessing would be a valid [evidence] to establish that the property is [the ownership of a person]. Abū Yūsuf stated in his *Kitāb al-kharāj* that when a group of people [paying the] *kharāj* died during wartime, and no one was left, and their land remained without any use [*muʻaṭṭala*], without anyone knowing to whom it belongs, and with no litigation in process, and then a man comes and cultivates it and plants it, pays the kharāj or the ʻushr, it thus belongs to him [*hiya la-hu*] [since] that was a dead land [*mawāt*]. And the imām has no right to take something from one's hand unless it is accompanied with a known and acceptable right. We have also stated, [based on Abū Yūsuf,] that the lands of Iraq, Syria, and Egypt, became kharāj by force [*ʻunwiyya kharājiyya*] and were left over to the people who were vanquished. ... So, if these lands were the property of their own people [*mamlūka li-ahli-hā*], how serious then is the claim that it became the [property of] the treasury, with the possibility [*iḥtimāl*] that all those people died without heir [?]. Such a possibility does not cancel [*yanfī*] the right of property that was firmly established [*al-milk al-ladhī kāna thābit-an*]. ... Imām as-Subkī said that the fact is that Syria and Egypt are in the hands of the Muslims; no doubt they have [their lands] either as waqf ..., or milk, and the properties whose origin is unknown [become property of] the treasury. So if someone possesses [a property] and he is not aware from where it came from, the property remains his [*yabqa fī yadi-hi*] and he does not need evidence [of ownership] [*bayyina*]. And [as-Subkī] added that when we find a property in the hands of someone which could be his milk, it is possible that he brought it to life [*aḥya*] or that it was legally transferred to him [*waṣala ilayhī wuṣūl-an ṣaḥīḥ-an*] (4:180-1).

Such passages are among the strongest, within the Ḥanafī literature, not simply drafted in defense of possession and private property, but also as a direct attack on a system that transferred many private properties to the treasury "illegally." Thus, the legal fiction of "the death of the kharāj-payer without heir" is here pushed to its ultimate limits since the state's ownership is not yet fully acknowledged. More important, and for the purpose of understanding the procedural fictions of the sharīʻa courts, the text legitimizes the *waḍʻ yad* ("occupation") notion as enough evidence by itself in establishing ownership, or, more precisely, it provides the right to "own" a property which was "possessed" as a combination of *waḍʻ yad* and *taṣarruf*.[64] Thus, parallel to the legal fiction of the "death of the owner," another fiction was established: those who worked on lands left over by their original owners and never claimed by anyone; such lands were similar in status to the *mawāt,* but in many cases mīrī

64. Similar perhaps to a principle known, in American common law, as "adverse possession," a rough equivalent of squatters' rights.

and assigned to multazims or farmers, and should become the full property of those who "revived" them. From a legal point of view, those claims eliminate two impositions upon the new "owners": 1) they do not need to show how their property was transferred to them, since as long as they revived a property and were working on a land that no one else claimed, that was enough evidence in itself; and 2) there was no need for formal evidence of ownership either—occupation of the property *might* be an indication of ownership by itself.

> Based on Subkī, Ibn Ḥajar Mulkī said in his *Fatāwā fiqhiyya* that we openly rule in favor of land and waqf owners to maintain their ownership. Indeed, we are not offended by the fact that these lands were originally [*aṣl*] the property of the treasury, or a waqf for the Muslims, because we looked upon each land case with its own specificity [*bi-khuṣūṣihā*], and when it turned out that it was neither waqf nor milk, the other possibility was that it was *mawāt* and brought to life again [*uḥyiyat*]. And even if it turned out that it belonged [originally] to the treasury, a hand's permanence upon it [*istimrār al-yad 'alayhā*], and its use with the status of a landlord [*al-taṣarruf fihā taṣarruf al-mullāk*], or that of an administrator [with a waqf], all constitute visible evidence [*qarā'in ẓāhira*], over long periods of time, for not interfering with [those who own these properties] and thus avoid confiscating them [*intizā'*] (4:181).

Without much hesitation or ambiguity, the above passage claims that all lands "occupied" by individuals who have been cultivating and planting them for long periods of time, and whose status became that of *de facto* "owners," also enjoyed all rights of legal ownership. In fact, what some passages allude to is that a category of "possessed" properties were considered as milk—that is, privately owned, even if it turned out that they were "originally" the property of the treasury. However, the fiqh texts stopped short at explaining *how* those de facto "owned" properties should become *legally* owned: Which legal and bureaucratic procedures should be followed? Were they to be considered, by the state authorities, as *legally* or *de facto* milk? Could a property undergo a change of status through court procedures?

What is of interest to us here—from the point of view of judicial decision-making—is that Ḥanafism only laid the groundwork for an acknowledgment of an individual's right over a property he has "taken care of" for a prolonged period, which *in principle* should accord him full property rights whatever the original status of that property. Ḥanafī practice thus did not establish *how* an individual should proceed in order to prove that the property was his or hers, but only that an established "right" does exist. Alarmed by the abuses of rulers, their followers, representatives, and the various state officials who had been either claiming the lands of others, or else extracting from the peasantry much more than what they ought to, the jurists strongly sided with the *de facto* landowners and their farmers:

> What is extracted from the Syrian lands is the *kharāj muqāsama,* and we wrote that what goes to the treasury is a rent [*ujra*] equal to the kharāj:[65] what the imām is thus legally extracting is the kharāj, and where this has been applied, it establishes a criteria [for what the farmers should pay] [*tu'tabar fihi al-ṭāqa*]. And it should be known that what the people [*ahl*] of the *timār*[66] and *za'āmāt*[67] are doing in requesting the villagers to give them what the sultan has assigned to them, such as half of the produce and the like, is pure injustice. The reason is that what has been allocated [*mu'ayyan*] in the sultanic registers was based on the fact that only these amounts should have been collected from the farmers who [are entitled to] keep the rest [of their produce][*al-fāḍil*]. But the reality in our time is contrary to this since what is unjustly collected from them now, known as the *dhakhā'ir*[68] and the like, is too much, even equal in some lands to the entire produce [*khārij*]. This is extracted from them even when the land does not produce anything, and we have seen some *timār*iots[69] giving up their land to someone else because it was overburdened with injustice [*ẓulm*], and for this reason their request for dividing [the produce] [*qasam*][70] is an act of injustice upon an injustice, and injustice should be done away with [*i'dām*]. It is therefore illegal to help the *timār*iots in their injustice, and lands should be looked upon only in terms of what they could afford, as Khayr [al-Dīn] al-Ramlī already stated (4:188-9).

It is quite possible that Ibn 'Ābidīn kept the old terminology of *timār* and *za'āma*—both practically extinct by the late eighteenth century—in order to conform to Ramlī's text. Other than that, his message was quite clear as to its purpose: the farmers should only pay the "equivalent" of the kharāj. He had already stated on previous occasions (4:188), and also based on Ramlī, that the Syrian lands belonging to the treasury were under a general contract of a *kharāj muqāsama,* which he also referred to as an "equivalent to a rent [*badal ujra*]" because the farmers were paying their "landlord," the state, a

65. That is, the *kharāj muqāsama,* or *māl mīrī* in the official Ottoman texts (sharī'a courts and majālis).

66. This is a direct reference to the old sixteenth-century tax-farming system; but as with the mīrī, whenever Ibn 'Ābidīn drops their name, he does so without any attempt to dissect the essence of the system. In nineteenth-century sharī'a courts documents, terms referring to the old tax-farming system were still in use, albeit very marginally. It is not clear, however, whether they were meant to be taken as simple names without any real content, or whether they did express some real privileges to families with "*timār*" assignments.

67. In Turkish: *zeamet:* large fief.

68. A common term in the majālis records (*dhakhāyir*), seeming to refer to what was often demanded by the treasury in addition to the *māl mīrī,* a sort of "tax" at the margin of the mīrī, which was more of a "rent."

69. More commonly known as *sipāhi*s.

70. A lump-sum-rent similar to the *maqṭū':* in those cases, the mīrī was not estimated on the basis of a percentage of the produce.

specific "rent" in kind—usually equal to one-tenth, one-fourth, or half of the produce—for their right to exploit the land: "What is extracted nowadays from the lands of Egypt and Syria is a rent [*ujra*] rather than a ʻushr or a kharāj, and this, on lands which have become the property of the treasury, excluding all milk and waqf lands. But such a rent is [in principle] an equivalent to the kharāj [*al-ujra badal al-kharāj*]" (4:186); but, privately owned lands and waqfs "were paying the kharāj rather than a rent" (4:182). On the other hand, "when one has a property in his hand ["occupation"], he then owns it [*man fī yadi-hi shay' fa-huwa milki-hi*]" (4:181). Moreover, "there was a consensus among the *'ulamā'* not to request for a written document [*mustanad*] [as proof of *milk*], considering that the visible hand [*al-yad al-ẓāhir*] [over the property is all by itself enough evidence] that it was legitimately placed [*wuḍiʻat bi-ḥaqq*] where it belongs" (4:181). In short, what all this amounts to is the following: 1) the "rent" extracted in Ottoman times over *mīrī* lands was in principle an "equivalent" to the old *kharāj muqāsama;* 2) in many cases, however, there was a common phenomenon of "rent abuse": the state's agents and intermediaries extracted more than what they were allowed to; and 3) land "occupation" could be an indication of full ownership to the point that no formal documents establishing past ownership were necessarily needed as evidence.

Table 4-2
The gap between the language of the fiqh and the sharīʻa courts

Category	Fiqh	Courts and majālis
State owned lands	commonly referred to in the Ḥanafī literature as *arāḍī al-mamlaka wa-l-ḥawz;* sometimes also as *arāḍī sulṭāniyya,* or *arāḍī bayt al-māl.*	*arāḍī amīriyya,* or *mīrī* (*timār* in the older system).
Privately owned lands	*arāḍī kharājiyya* or *arāḍī 'ushriyya;* or *milk.*	*milk*
"rent"	*ujra;* or *kharāj muqāsama* (up to one-fifth of the produce). *ujra* or *ijāra,* usually for privately leased properties, or more generally, for hire contracts, including labor.	• *māl mīrī, amwāl amīriyya,* or *mīrī;* also: *'ala jānib al-mīrī;* in this respect, the *'ushr,* usually named in its plural form as *aʻshār* or *taʻshīrāt,* and used interchangeably with the *mīrī,* was more of a "rent" than a "tax," and assessed as a percentage of the produce. • *maqṭūʻ* and *qasam:* lump-sum-rents.

Table 4-2: 1/2

Category	Fiqh	Courts and majālis
"tax"	*kharāj* or *'ushr; kharāj muwaẓẓaf;* sometimes referred to as *gharāmāt.*	• *aghnām, dhakhā'ir,*[71] *mubāya'a,* etc.: all of which imposed as additional taxes at the margin of the *mīrī.* • *virghu:* a land-tax estimated on the basis of the land's value.
tax-farmers	*ḥukkām al-siyāsa; timār*iots (used anachronistically with the iltizām system).	*multazim*s (*timār*iots in the old system).

Table 4-2: 2/2

Commentary: The Ottoman Ḥanafī jurists in the Fertile Crescent have for the most part kept the old taxation terminology active, while providing very little in terms of an understanding of the specificities of the Ottoman system. There is thus a visible "gap" between the language of the parochial fiqh manuals and the sharī'a courts and other bureaucratic documents. Between the fiqh that ignored it, and the qānūn which was limited to regulations, the Ottoman taxation system was strangely left without any proper conceptualization. My argument is that Ḥanafī practice was looked upon as a "special community law," and as such was mostly the domain of private litigations in which the state was not a party. By contrast, taxation problems and disputes related to mīrī lands were relegated to other judicial authorities such as the regional councils. Ḥanafī practice was thus left within its own domain and did not have to modernize its language relative to the period in question.

Rebutting a case

The land question, and the *waḍ' yad* practice in particular, reappear in bits and pieces all over the *Radd,* without any attempt, however, towards a systematization that would have provided a coherent law of property, or even clarified at a minimal level the essence of the *mīrī-iltizām* system, and its predecessor for that matter. For that reason, property transactions, transfers, and conveyances, often appear in court registers as contractual settlements through procedural fictions. In other words, it was the law of contract that made possible for the most part either property transactions or the change of status of landed properties. The question of the thin line between ownership, possession, and occupation, and over which many of the court cases hover, reappears, among others, in the seventh volume of the *Radd,* completed by the author's son, Muḥammad 'Alā' al-Dīn, under the title of *Qurrat 'uyūn al-akhbār.* In the "lawsuit book," *Kitāb al-da'wa,* the link between lawsuit

71. Ibn 'Ābidīn, *Radd,* 4:188-89, see below.

and "litigation [*khuṣūma*]" is posed on the basis that "a litigation is legally the lawsuit and the reply to it" (*Qurrat,* 7:398). The judge uses the term "plaintiff [*mudda'ī*]" when no evidence has yet been furnished; and the plaintiff ceases to be so, and becomes a "rightful person [*muḥiqq*]," once enough evidence has been furnished in his or her favor. It is indeed the defendant's duty, in this interim period, to prepare his rebuttal and present "counter-arguments for the case [*daf' al-da'wa*]" (7:399).[72] The notion of *daf'* (literally: pushing back or away) is usually associated with the defendant (*al-mudda'ī 'aly-hi*) since obviously he is the one to plead against and challenge the allegations of the plaintiff. More specifically, concerning land litigations, what plaintiffs usually plead for is a *daf' al-ta'arruḍ* on the part of the defendant whom they accuse of illegally "having his or her hands" over their properties: "when two persons make the claim that the same land is theirs [*al-arḍ fī yadi-hi*], and one of them proves that he is right, he is then pressing a claim for stopping the trespassing of the other [*mudda'i-yan daf' ta'arruḍ al-ākhar*], thus furnishing evidence [*athbata bi-l-bayyina*] that it is indeed his own land, and since evidence is only accepted in a valid lawsuit [*ṣiḥḥat al-da'wa*], we know that the validity [in question] is a *daf' al-ta'arruḍ*" (7:399). The procedure of *daf' al-ta'arruḍ* complements that of the *waḍ' yad* encountered earlier in conjunction with properties whose status was either not very clear or which *might* have belonged to the treasury: thus, "having one's hand over the property," working on it, and cultivating it, was "enough evidence" that the "possessor" or occupant was also the "legal proprietor." Interestingly, even though establishing that a property "belonged" to X implied that X had to sue Y for "trespassing [*ta'arruḍ*]" over his or her property, and the plaintiff had to furnish evidence that the property was "in his hand," in fictitious litigations, however, things simply happened the other way round: Y would sue X for usurpation, and X (the defendant) would "win" the case (Chapter 5 *infra*). Thus, occupation and usurpation were necessary prerequisites for establishing one's ownership over a property. The plaintiff would then make the claim "that this person has illegally intruded over this and that [that belongs to me], and I therefore ask him or her to stop the intrusion. The judge would then forbid him or her to intrude illegally over the other" (7:399). But if "conflict and intrusion are close to each other [*al-nizā' wa-l-ta'arruḍ mutaqāribān*]" (*ibid.*), what however distinguishes them from one another is that "intrusion" is something done "without right [*bi-ghayr ḥaqq*] and even with the purpose of damaging [*mujarrad adhya*], while conflict [*nizā'*] is based on a [semblance of a] document that was thought to

72. The Majalla devoted a chapter to the notion of *daf' al-da'wa:* see, Salīm Rustum Bāz, *Sharḥ al-Majalla* (Beirut: Dār al-Kutub al-'Ilmiyya, a facsimile from the original [1888?]), 2:927-933.

exist [*mustanad yutawahham wujūda-hu*]: the difference is thus clear" (*ibid.*). In more concrete terms, both intrusion and conflict operate within the notion of litigation as a necessary component of the process that brings a lawsuit into existence, and a final ruling too: the plaintiff is the one who initiates the litigation, while the defendant has to plea against the charges. Within that legal framework, intrusion usually implies no more than an "occupation," *waḍ' yad:* "this person claims that this land is in my hand and this is the evidence supporting my claim; and another person claims that it is his and in his hand, without presenting any evidence. [The first person then requests that] I don't want him to intrude on my property anymore because I proved that I have a hand [*dhū yad*] and he didn't" (7:400). Starting from this basic definition of litigation, the courts will have to invent several procedural techniques on their own to handle the great complexity of cases they were faced with. It was as if the "drift" that characterized Ottoman sharī'a law from the classical and pre-classical periods had to be complemented by another "drift" coming from the courts themselves.

Interpreting the past: "Feudal" variations

We're still a long way from a theory that would coherently explain the *modus operandi* of Ottoman "feudalism." To be sure, the Ottoman "feudal" system operated with great variation between regions and provinces (Damascus and Mount Lebanon were a prime example). But such variables notwithstanding, the system must have functioned within a broader common logic than the sum of its parts to survive that long. The data remain fragmentary and a major setback has been an inability to root the socio-economic system into some of its most basic components, in terms of law, cost, and efficiency.

For our purposes here we will look at two fundamental reproductive institutional units out of which the Ottoman feudal system could be conceptualized: at the most basic level stood all kinds of contractual obligations between individuals and groups, and at a higher level, the *muqāṭa'a* acted as the unit of taxation, production, and reproduction of the feudal system. Since any agreement between two or more persons constitutes a contract, the transaction is for any society the most basic "legal" unit for the reproduction of the social and economic institutions. It does not matter whether such contracts are conducted orally or in writing, between individuals or groups, formally (by following strict legal rules) or informally, or whether they will be approved in court in the case of non-performance, or whether contractual settlements are followed by rituals (such as shaking hands, or ceremonial rituals) or are customary, or are simply concluded in the space of a courtroom. All such

variations do constitute contracts, even though their legal significance may vary greatly, as some might be enforceable by a legal authority while others are not, not to mention the different values that societies attach to their own contractual settlements.

In Ottoman societies, the elaboration of contractual rules and regulations was mostly the work of jurists, and our knowledge of contracts cannot but rely heavily on the Ḥanafī fiqh manuals, but it was left to bureaucrats to work out the regional taxation rules that regulated the transactions between the state and various types of households (the basic unit of reproduction and taxation). In effect, when it came to transactions where the state was not a partner, it was left to Ḥanafī practice to determine such modalities. Such a bulky material has often been avoided by historians on the ground that its historical nature remains uncertain: because jurists had to be faithful to their own *madhhab,* they tended to sacrifice their own period in favor of a harmony with the canon, thus strengthening the division between the "ought" and the "is." But such fears are, however, misplaced, in particular since the amalgam of the sharī'a court and bureaucratic documents, in addition to other "legal" texts, provides an opportunity for "verification" between various discursive levels. In fact, the significance of the fiqh manuals could only be appreciated once their discursive norms are reconstructed and assessed in conjunction with other discursive practices, among them the sharī'a courts. But the study of contracts should not be limited to their exchange mechanisms, namely, the modalities of exchange and the value of commodities in terms of cost, supply, and demand. In fact, the transaction costs that stand behind contracts (and hence property rights) are fundamental in determining which contractual settlements and property rights are favored at a particular historical juncture. Such an approach is the aim of this study.

We now come to the complex issue of the economics of a *muqāṭa'a,* and like contract, if not more so, it remains misunderstood in terms of its *modus operandi.* The *muqāṭa'a* that is of interest to us is not necessarily the "tax"-unit (a misleading term, considering that what was extracted was more of a "rent" than a simple "tax") adopted by the imperial state (even though the two might coincide). The *muqāṭa'a* that could be useful for analytic purposes should be no more than a single unit of production and its monetary organization: is it possible to measure a "net profit" once input and output are properly assessed?

Halil İnalcık has repeatedly argued that in the classical period (the sixteenth century) the *çift-hane* system was at the basis of the production of traditional society and its taxation by the state.[73] While *çift* refers to *çift öküz,* or pair of

73. Halil İnalcık, "Village, Peasant and Empire," in *The Middle East and the Balkans under the Ottoman Empire: Essays on Economy and Society* (Bloomington: Indiana University Turkish Studies, 1993), 137-60.

oxen, the *hane* was the household, or the individual unit of production. The assumption here is that the individual peasant family was the fundamental cell of production, and was therefore taxed on that basis in arrangements similar to those in classical Islam (Table 4-1). To be sure, such arrangements tended to minimize the role of "intermediaries" such as the *sipahi*s, as the state restricted by law how much should be extracted from each household (the system privileged the patriarchal *hane,* or household controlled by a male). The land that was granted to the peasantry under the *çift-hane* system was state owned and mīrī, and whenever it was directly granted to the peasantry it was part of the *miri tapulu* land system. That system existed side by side with the *miri mukataalı,* when a *mukataa* was granted to a tax-farmer, or the individual who paid a lump sum as rent often by auction to the highest bidder.

Needless to say, it was the *mukataa* (Arabic: *muqāṭa'a,* a "cut" territory) that survived in most provinces, so that even by the seventeenth century, the older *timar-sipahi* system had been already dominated by the *a'yān-multazim*s. Such a transformation only indicates the increasing role of all kinds of intermediaries, and the difficulties that the imperial state encountered in collecting its taxes without the services of such a "class" of individuals and families. It was that system that survived throughout the nineteenth century, albeit very differently between Damascus and Mount Lebanon.

For our purposes here it is important to note that the system has been mostly approached from the point of view of the state, in particular that *tapu* registers are the only ones to provide taxation estimates at both the household and village levels. But to understand the system fully, one needs to know the bookkeeping activity of each "productive cell," meaning the "unit" (which is not to be identified with the *muqāṭa'a*) that was under the jurisdiction of a single individual or family. In Mount Lebanon such a "unit" was known as the *'uhda* ("custody"), and tended to be smaller than the *muqāṭa'a,* which was the tax-unit for the state. But the real finances, however, were kept not at the level of a *muqāṭa'a* but within the *'uhda* (or its equivalent in the Syrian countryside):[74] first, its effective maintenance costs, and then how much output it generated. Several difficulties stand in our way for assessing the finances of

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Even though İnalcık's aim was to dismantle the Weberian thesis of "sultanism" and the so-called Marxist thesis on an "Asiatic mode of production" dominated "from above" by an imperial center (the bureaucratic and territorial state), it remains nevertheless true that, the *çift-hane* notwithstanding, land distribution was mostly granted by the state and its various bureaucratic instances, which roughly corresponds to the old feudalism of the Holy Roman Empire (the low Middle Ages). By contrast, in the high Middle Ages, the *seigneuries* system implied land distribution to the new military aristocracy "from below."

74. The term *'uhda* was more forcefully used in Mount Lebanon than in the Syrian countryside, even though the Damascus documents often refer to the act of granting as *fī 'uhdat fulān,* or being in the custody of X.

such units. (1) The data used by most historians, such as *tapu defter*s and succession (*tarikāt*) registers, are insufficient: the former give figures of what the state was able to collect within a certain locality on a yearly or bi-yearly basis (combined with the number of individuals and households), but they fail to show how much has been invested within that taxable unit, and how much has been generated as produce or as "profit"; while the *tarikāt* only assess the fortune of an individual once in a lifetime, so that figuring out a proper bookkeeping activity from such registers is only a matter of guesswork at best. (2) There are very few bookkeeping records of *muqāṭa'jī*s or *muta'ahhid*s (or multazims) which have survived, and, of course, those would have been the most precious. (3) More importantly, however, is the ability to make meaningful assessments in an economy where the bulk of the peasantry worked under a corvée regime (but less so in Mount Lebanon), which is hard to evaluate in terms of real costs, precisely because each household kept part of the produce for its own survival, and the surplus was always exchanged in kind, while the final "profit" of the individual or family was in cash.

Such productive agrarian units were sometimes referred to as *çiftlik,* even though the naming might differ among regions and provinces (and seems a bit remote from the *çift-hane* system described by ʃnalcık in that the peasants were for the most part left unprotected, except in Mount Lebanon), so that in Greater Syria the equivalent appellation of *mazra'a* might be more common in some areas. Whatever the name, the problem rests in being able to define such units for analytical purposes.

(1) The production in such units was mostly based on agriculture, so that manufacturing guilds were typically not included and, if they were, they would have had not much effect on the total output of the unit since they were primarily meant for the local consumption and subsistence of the households (by contrast, city guilds produced for exchange and controlled pricing by producing less than market demand). (2) They ought to be looked upon as single productive units, or as totalities within themselves. Labor was organized in such a way so as to be able to assess the total output and costs. (3) Such productive units could have been composed of anything from one to several villages, one to several "farms," or a combination thereof. Hence the difficulty of finding the right term for that "productive unit," and that's why the Ottoman fiscal unit of *muqāṭa'a* might not be the most convenient since, even though it usually consisted of a combination of villages and farms, it represented the fisc of the state but not necessarily the bookkeeping of *muqāṭa'jī*s or multazims. The drawback was that the *muqāṭa'a* was typically broader than a single productive unit, so that its functioning was at the same time more complex, but also disappointingly misleading since the bookkeeping activity normally took place at the lower level of the productive unit. Obviously, some of the official

muqāṭa'āt might have coincided with the single productive units, but it must have been so only by accident, since official assignments were concerned with the social and economic weight of their assignees. It was therefore left to the latter to envisage the bookkeeping methods that suited them the best. (4) The single productive unit must have been envisaged as such by its "owners" (the state, waqf authorities, or individual landowners) on the basis of what they could produce and their self-sufficiency, without reliance on other units (they could also be described as "autonomous" in their own right). The point here is that labor was organized accordingly, meaning that the balance-sheet has to go even by the end of the production cycle or the calendar year. To begin with, the bulk of labor consisted of corvées duties so that the majority of the peasantry worked for no more than its formal subsistence. Such labor cannot be therefore assessed at market price (doing so would only give absurd calculations), and its only cost consisted of no more than the subsistence of the peasants. To be sure, there were higher gradations of peasants (such as the *ṣūbāshī*s, whose status was conspicuously protected by the regional councils), which pushed for special tenancy contracts with their landlords (sharecropping was favored since it gave the tenant-farmer a fraction of the produce irrespective of market-price). (5) Considering that the three big divisions of property rights were mīrī, waqf, and milk, did it make any difference to which category a productive unit belonged? In some respects it did not since the bulk of labor was corvée, so that all those lands were auctioned to professional multazims irrespective of their category. On the other hand, landholding patterns could have created substantial differences in auctioning or leasing the land, and thus directly effect the status of the peasantry. To begin with, the cultivation and production tended to be different from one category to the next. Thus, state-owned mīrī lands were from the classical period times geared towards wheat-barley cultivation, while waqfs generally specialized in plantations (vineyards and orchards); and, finally, milk lands were smaller parcels, often referred to as "gardens" (*basātīn,* s. *bustān*) and contingent to the peripheries of the cities. In effect, grain cultivation was controlled by the state and thus kept within the domain of the mīrī, and multazims who were auctioned those lands by the state had to take into consideration all kinds of price limitations and obligatory dues (*mubāya'a*) when exchanging their surplus. Moreover, even though waqf domains could have been as large as those of the mīrī, the nature of their plantations, whose produce was sold at better prices than cereals, not to mention their subjection to a single administration (originally stipulated by the founder), made them more attractive to peasants. Thus, for example, in nineteenth-century Mount Lebanon, mulberry plantations and the production of silk, most of which took place either on quasi-private properties or waqfs, pushed the region towards an early adoption of an aggressive manufacturing and proto-capitalism.

Let us assume that the mīrī and waqf were the two most important rural categories of landownership, and that mīrī lands had to be auctioned on a regular basis to multazims, what were then the implications of iltizām on the productive cycles and finances of each unit, be it a *muqāṭa'a* or something else? The "cost" of a single iltizām cycle for one productive unit could be divided into three basic components: (a) the *māl al-iltizām,* which was the cash-sum that the multazim paid for his public auction of the fiscal unit in question; (b) the *māl al-mīrī,* which was the "rent"—officially the "tax"—that should be paid to the treasury, and which was grosso modo calculated based on the yield of that fiscal unit (because technical innovations and price fluctuations were slow, a reevaluation of the mīrī dues on a regular basis proved unnecessary, and hence *mīrī* evaluations were generally based solely on area rather than on output in relation to production and cost); and finally, (c) the surplus that the multazim was able to generate from the whole operation, after payment of all dues and expenses, and which consisted, in the final analysis, of his profit (and which was the only part in the whole cycle that could generate cash). The assumption here is that the peasants kept part of the produce for their own subsistence and that they were not, for the most part, paid in cash, and that the fraction of the produce that they kept for themselves could not be considered as a payment in kind either. Does it make any difference then whether the land was mīrī, waqf, or milk? It wouldn't make much of a difference if the same iltizām system was used in all three. Thus, waqf documents routinely mention that a land had to be auctioned to a multazim, who might have run in conflict with the administrator, hence the need for a court action. In that case, even though the dues to the treasury were most probably paid by the waqf authorities rather than by the multazim, the three sums briefly outlined above remain remarkably similar, if not the same.

Before moving to the next chapter, we need to examine how contractual settlements, which were analyzed in the previous chapter, point to the intricacies of Ottoman feudalism. To begin with, and considering the predominance of status contracts, contractual settlements tended to remain within the range of the family, clan, or network. In fact, and considering high-information costs, when negotiations remained between individuals and groups that knew one another, risk was minimized and the certainty that the contract would be performed was certainly greater. Moreover, without the procedural fictions that have flourished throughout the Ottoman period (Table 2-2 *supra*), and which were all along a bystander effect of Ḥanafī practice, many of the contractual settlements analyzed in this book would have been impossible. In effect, all such fictions had as a primary purpose to bypass limitations imposed by (a) the division between the mīrī, waqf, and milk system; (b) the concept of equal and simultaneous exchange; (c) the Islamic rules of inheritance; and (d) the harsh

parallelism that Ḥanafī practice draws between a contract of sale and a regular lease, thus subjecting the latter to the former. Let us briefly discuss each one of those statements on its own, as they will all be of primary importance in analyzing many of the cases in the following chapters.

To begin with, and as a general remark, fictions were not primarily aimed at duping the Ottoman authorities in order to bypass the rigidity of landholding patterns and the predominance of state-owned lands, even though it is to be expected that effectively there were at times mīrī lands that had been illegally converted to either milk or waqf. Fictions should rather be looked upon as a necessary evolution within Ḥanafī practice, which was looked upon by the imperial state as a "special community law," hence with a "private" character rather than a "public" one. The Ḥanafīs in turn integrated all kinds of customs into their practice, thus making their long-standing tradition adapt fully to regional and contemporary needs—hence the need for procedural fictions. Thus, for example, in the big distribution of landholding patterns, mīrī lands could be transferred to milk (and then to waqf, if needed) only by sultanic decree in the form of donation (*hiba*) specifically to a person or family. But, as noted in the previous section, the Ḥanafīs approved that a land that has been cultivated for a period of time, and "occupied" accordingly, be "possessed" by that same person irrespective of its original ownership, even if it were the state. To do so legally, so that the land becomes "owned" by that same person who "occupied" it for a period of time, a procedural fiction is needed. The plaintiff accuses the defendant of illegally occupying his land (*waḍʿ yad*), thus forcing the latter to furnish evidence in the form of witnesses, prior to receiving a ruling in his favor.

Similarly, the Islamic rules of inheritance have always posed problems in terms of property fragmentation and its loss to unwanted heirs. Both have been dealt with thanks to fictitious sales where properties were exchanged and reassembled to fit better with the needs of the inheritors. Another formula was the husband suing his wife (or vice versa) so that they would transfer their properties to their children while avoiding the pitfalls of having them distributed to their own brothers and sisters or to the elders in the family. The heirs in turn would sue one another in an effort to redistribute the inherited properties, while women would receive at times some of those properties in toto to avoid the fragmentation or confiscation on the male side (C 5-1 & 5-2 *infra*). Such fictions were even common to non-Muslims, who by virtue of some of their own customary laws that forbad inheritance to women, reshuffled their properties in the Ḥanafī courts. It would therefore be totally erroneous to look at all such cases as genuine acts of sale, and even more misleading to consider that women and minorities were treated "equally" or "fairly" since those sharīʿa documents represented the use of fiction in its most perverse ways.

Another aspect of these fictions were their wide use in lease contracts (Chapter 3 *supra*). Besides the usual needs to extend leases beyond their legal three-year periods, fictions were necessary to acknowledge all kinds of investments in the leased properties and, hence, to create out of the tenant a de facto second "owner." What such operations do point to, however—and many are still common to date—is the uncertain status of "private" property in the sense that the cost of maintaining it would have been so prohibitive that preference was given and rights were granted to those who made use of it.

To conclude, we need to look very carefully at contractual settlements. It was all manner of contractual arrangements that in the final analysis gave shape to the status of properties. In effect, because private property was hard to acquire, even harder to maintain, and easy to lose, and due to the abundance of the mīrī and the inefficiency of that system, individuals and groups related to a property through various contractual settlements, whose variety was much broader than the rigid property distinctions. Thus, waqfs were less devices for the protection of a portfolio of private properties than a web of contractual arrangements which linked the beneficiaries to one another, on the one hand, and the administration with various tenants, on the other. In effect, the Ottoman system was characterized by a predominance of contractual settlements over property types, the latter receiving their shape from the former. In other words, considering that the conception of private property did not evolve much, property rights were worked out and negotiated through contractual settlements, thus leading to an array of procedural fictions to accommodate such bargains. Had the notion of private property solidified, and its implementation become cost effective, as is the case in many modern systems, defining those private property rights would have been the core issue. But when the notion of "private" has not yet matured enough, the judiciary facilitates contractual settlements through fictions. The Ottoman period was thus characterized by a flux of contractual settlements defining specific property rights, whether on mīrī, milk, or waqf lands. One way to explore such a flux is through a micro analysis of cases, which is what we hope to achieve in the following chapters.

Chapter 5
The ethnography of court documents: The transfer of property to women I

All sharī'a court documents dealt with thus far have been examined in conjunction with the legal doctrines that supposedly sustained them, and thus, little has been done in terms of analyzing cases singly for their own sake. The overall aim was to show how the classical theory of contracts and obligations (assuming there was one) produced in Ottoman times contractual settlements that in principle should have been unacceptable from the perspective of the canonical texts, but were acknowledged by the jurists out of convenience, in conformity with local customary practices. Those customary contractual notions produced, in turn, all kinds of self-correcting court practices (see Chapter 3 *supra*), thus greatly contributing to a refinement of those parochial norms, while bringing a mostly obsolete and rigid law of contracts into acceptable practices that in principle should have been illegal. In this chapter, I would like to push further the notion of self-correcting contractual settlements based on cases wrapped into alleged "litigations," and show how fictitious litigations, introduced in court in a *khuṣūma*-like language were nothing but simulated contractual arrangements—or conveyances—which could not be overtly posed as such, and whose main purpose was to define and consolidate property rights. For that purpose I examine two documents, each singly, from the sharī'a courts of nineteenth-century Beirut, the first dealing with the inheritance of Emir Bashīr II Shihāb, a Maronite who ruled Mount Lebanon from 1788 until the Egyptian withdrawal in 1840;[1] and the second

1. The first document, dated 4 Ṣafar 1274 (24 September 1857), is five pages long (legal size paper) and is written by hand in the style characteristic of Ottoman sharī'a court documents. In the absence of a strong and influential Lebanese "National Archives" (even though a governmental, hence public, institution under the name of *al-maḥfūẓāt al-waṭaniyya* does exist), court documents usually are preserved separately by each "community" (*ṭā'ifa*). The largest number of Ottoman sharī'a court records (only those from the mid-nineteenth century on have survived) are preserved in the main Sunnī courthouse in Beirut, situated in

with property transfers between two brothers and Shihābī emirs, and their respective wives. In the following introductory remarks, I explain why the analysis of sharī'a documents singly, in conjunction with other "legal" texts (fiqh manuals, fatāwā, sultanic ordinances, and rulings of regional councils), is appropriate and useful and why it will adopted as a methodological tool in this study.[2]

Since the sharī'a court records of Ottoman Syria became available to researchers in the late 1960s, they have been used primarily to reconstruct the social and economic history of Greater Syria (Bilād al-Shām), its cities and the surrounding countryside.[3] Researchers who attempted to write the social history of a particular locality found court documents to be an important source of information that supplemented the French and British diplomatic records. Court documents made it possible to reconstruct family genealogies, to trace the intergenerational transmission of property, to understand the structure of craft-guilds, and to describe the tax-farming system (*iltizām*) and the way it was handled by the notables (*a'yān*) and tax-farmers (*multazim*s). These studies are important, especially insofar as they provide a global picture of the political economy in Ottoman societies. But by treating court records as a source of "facts," these researchers tend to disregard or ignore the enterprise of judging and the role and function of the judicial system in Ottoman societies. Moreover, while ignoring the intricacies of adjudication, researchers are left with the only option to read their documents literally, which implies, among others, that a litigation (*khuṣūma*) could only be perceived as a genuine litigation, which is incorrect. In fact, the sharī'a courts were

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the Jāmi' al-Imām 'Alī (West Beirut, neighborhood of al-Mal'ab al-Baladī). Since the courthouse is not a formal archive and because it currently is used to hear personal status cases, the Ottoman documents are not generally accessible to researchers; also, photocopying was available, during my last visit (summer 1995), only prior to approval from the chief-judge. "Inspection" of the documents therefore depends upon the goodwill of the functionaries of the Sunnī courthouse, in particular the chief qāḍī. There are no indices, and neither the registers (*sijill*s) nor individual pages are numbered; the only way to identify a document is by its date. Other Lebanese cities, such as Tripoli and Sidon, have their own Ottoman documents. The archive of Tripoli, which contains documents dating from the sixteenth century, is probably the best preserved and, having been microfilmed in its entirety by a group of professors at the Lebanese University, the most accessible to researchers. The first two registers are available in a facsimile edition. For a preliminary study based on the Tripoli Sharī'a court documents, see Khālid Ziyāde, *al-Ṣūra al-taqlīdiyya li'l-mujtama' al-madīnī* (Tripoli: Publications of the Lebanese University, 1983).

2. Indeed, the same remarks do apply to other types of documents such as the fatāwā, sultanic edicts, and the minutes of the regional councils, all of which are extensively discussed in this study, in addition to Ḥanafī legal texts.

3. For a preliminary assessment of the "social history" literature, see Zouhair Ghazzal, *L'économie politique de Damas durant le XIX^e siècle. Structures traditionnelles et capitalisme* (Damascus: Institut Français de Damas, 1993), Chapter 1.

plagued with cases I refer to as "fictitious litigations" and which, upon closer examination, were nothing but *contracts simulated in the form of litigations* (Chapter 3 *supra*). To understand the logic of such texts, one must begin with the limitations inherent in Ḥanafī practice itself, and its static notion of contracts and property. Thus, in order to safely transfer a property and secure it as milk to its beneficiary, or to ensure that a waqf is indeed irrevocable, the safest route was to simulate a litigation in order to end up with a judge's ruling that establishes the irrevocable nature of a transaction. Such procedures were by no means limited to property transactions and extended to torts and crimes as well (Chapter 11 *infra*).

Needless to say, and considering the dissemination of such procedures, deciding whether a litigation is genuine or fictitious has enormous implications for both social and legal history. Consider the hypothetical example of a lawsuit between a man and his wife in which the husband (plaintiff) has decided to revoke part of his will regarding his own waqf, including a clause appointing his wife as administrator. The husband thus fights his case in court armed with Abū Ḥanīfa's opinion regarding a founder's right to revoke his trust or sell the capital, while his wife (defendant) defends her administrative rights by pointing to Shaybānī's and Abū Yūsuf's opinions regarding the irrevocable nature of waqfs. The judge would then typically rule in favor of the defendant, declare the waqf valid and irrevocable, and confirm the status of the wife as administrator. Thus, the "disputants" managed to both validate their waqf and establish it as irrevocable. This "three-founders" procedure (Chapter 6 *infra*), however, was so common in Ottoman courts that it would be misleading not to see in it one of those typical fictitious litigations which are only simulations of contractual settlements. Such legal readings could prove crucial in understanding gender, family, and kin roles in the context of judicial decision making. Thus, a woman "winning" her suit against a husband or brother is not necessarily an indication of a "fair" distribution of gender roles in the courts, in particular if the "litigation," upon analysis, is fictitious.

To bypass therefore the factuality of courts records, which undoubtedly leads to a literal reading of those texts while taking their content at face value, it is not enough to apply to them modern linguistic, literary, and anthropological techniques. In fact, whatever the merits of such approaches, unless the meaning of each text is individually reconstructed within the specific framework of Ḥanafī practice, court procedures, and all the self-correcting practices which they engendered, those texts will remain opaque and impenetrable to modern observers. In fact, historians of the empire have typically avoided such complex readings, which fall within a legal anthropology tradition, thus opting for a more factual and compartmentalized approach. But what historians were truly avoiding—albeit seldom expressed as such—was the so-called "ideological"

nature of all "literary" texts, in particular those linked to an "author," and the difficulties researchers encounter in relating such texts to an historical social practice. Ironically, however, it is this belief in the "materiality" of documents—or their presumed facticity—that has often led to inaccurate readings. Contemporary historiography has therefore operated within a de facto division between different textualities: on the one hand, the sharī'a courts and all kinds of bureaucratic texts, all of which are handled on the basis of their facticity and "accuracy"; and, on the other, different brands of literary texts, be it legal, historical, biographical, or literary, whose presumed ideological biases and remoteness from social practice contributed in lowering their status among the historians, who prefered the former to the latter.

To avoid that kind of separation and hierarchies between texts, I propose the integration of sharī'a court records, among others, into their "cultural" context, which in this case primarily consists of Ḥanafī dogma, its perception of language, custom, and the judiciary (Chapter 1 *supra*), and the nature of self-correcting practices produced by court procedures. Indeed, the *montage of texts* proposed in this study consists in juxtaposing and superimposing different discursive practices hitherto kept separated in contemporary scholarship, which for the purpose of analyzing the "legal" apparatus have been limited to four: the fiqh, the sharī'a courts, the regional councils, and sultanic ordinances. Reading such a variety of discursive levels is not an easy enterprise especially since the inter-textual connections are difficult to track down. In fact, a common characteristic to those discursive practices is their incongruent nature and the "silences" that they impose at times on each other's practices. Thus, for example, an analysis of the Ḥanafī texts on land tenure reveals how much the Ottoman mīrī system was deliberately ignored by jurists,[4] even though the courts for their part had to impose their arbitration on a growing number of land disputes, and for that purpose had to rely on their own self-correcting practices. Such intriguing difficulties, however, should not push us towards favoring one level against another on the basis that it is more "practical" or "down to earth."

Against an approach that focuses on facts and data, I propose to undertake a "textual" reading of court documents and to analyze these documents as "texts." Philosophers, linguists, and literary critics use the notion of "text" to refer to the linguistic patterns created by words, phrases, and propositions, which, taken together as a unit of analysis, manifest, at a first level, a trivial and "literal meaning." "Textual analysis," however, claims that there is more to a "text" than what is visible at the surface. At a second level, any text

4. See Chapter 4 *supra.*

is by definition embedded in a set of ideological and socio-historical power constructs which historical analysis seeks to render explicit.[5] For example, a last will and testament is a "document" in the sense that it points to the deceased's intentions concerning the devolution of her properties; but, at another level, it is a "text" in the sense that it was drafted and conceived within an ideological (discursive) framework which, if made explicit, might inform us about constructs such as property, will, and inheritance. The notion of document-as-text suggests that documents should be analyzed as totalities, that is, as texts endowed with a particular "meaning" that the historian, with the benefit of hindsight, reconstructs and interprets. (This reconstruction should be a primary task of the social sciences.) Thus, considering the importance that late Ḥanafīs attributed to their juristic typology (see Chapter 1 *supra*), it would indeed prove erroneous not to take the latter into consideration when sorting out the layers upon layers of interpretations. Further, a reading and interpretation of documents-as-texts seeks to go beyond the manifest meaning of texts to their latent meaning, as I shall attempt to demonstrate in the following analysis of sharī'a court documents.[6]

My reading of court documents seeks to answer the question, "According to what logic does the qāḍī reach his judgment?" Unfortunately, court documents are draft-summaries that tell us little or nothing about the process of decision-making. A primary task for the reading of such documents is to recognize their limitations, that is, to acknowledge from the beginning what they cannot tell us. The logic of the document, that is, the way in which it is textually constructed, does not tell us much about the decision-making process since the document rarely explains the link between the various steps that tie it together and is, in this regard, incoherent. The difficulty of such an approach—and its main weakness—is that the activity of the qāḍī is obscured by the summary nature of the document, which is silent with regard to the

5. The notion of "discourse" approximates our notion of "text" in the sense that discourse is subject to hierarchical power relations. See Michel Foucault, *The Archaeology of Knowledge* (New York: Pantheon Books, 1972), Chapter 2.

6. Textual and discursive analysis does not presuppose a linguistic and philological presentation of the document-as-text, but it does not exclude the latter either. Careful scrutiny of judicial and legal words, sentences, and concepts, could, at times, prove quite helpful and necessary. Linguistic and philological presentation, however, whenever necessary, should be conducted within the context of the textual-discursive analysis I have outlined above, which implies, among other things, that the focus is on the global logic of the document-as-text, in its social and historical contexts. For each document, the main question we are asking is: What is it that makes this narrative legitimate? Or, in other words, which legal proofs are in themselves sufficient (that is, accepted by the legal system) that make this narrative legitimate? Linguistic and philological analysis is helpful from this perspective only when it could provide us with the socio-historical context that made a particular word or concept "acceptable" within the judicial discourse.

qāḍī's thoughts and actions. To be sure, the textual logic of each document cannot be discerned on its own. On the one hand, the impact of Ḥanafism is decisive since it shapes at least *fragments* of the texts, in particular that judges have to follow the juristic typology of their school, by specific opinions, or else seek a fatwā. On the other hand, it is indeed an inter-textual effort that would bring to light the internal "coherence" of documents. However, since each document is a totality all by itself, unless its *specific* meaning is revealed, generalities about the applicability of the law and the process of adjudication will not help much.

These problems lead us to the issue of the "author." Although each document is usually identified from the outset by the qāḍī's "signature" and seal (*khatm*), the "authorship" of the document is problematic.[7] Dictated by qāḍīs to their scribes (or sometimes drafted directly by the latter), the documents have an anonymous quality, as if a collective "we" had written them. The process of drafting a document belongs to the discourse of jurisprudence and its related subfields. Although this discourse contributed to the enterprise of drafting documents, experience and repetition also played an important role. Qāḍīs and their scribes learned their respective functions by observing their predecessors and by virtue of their own experience—hence the uniformity and stereotypical nature of the sharī'a court documents, which points to the conservatism of the qāḍī's court of this period. To be sure, the anonymous quality of sharī'a court records is related to the validity claims inherent in each document. Thus, the sole purpose of third-person narratives is precisely to depersonalize the text in order to construct a language of authority, so that even the judge—as narrator—introduces himself as "the qāḍī." Judges were neither supposed to be stylish nor to craft their *own* opinions, but if they did, it should have been in accordance with Ḥanafī juristic typology. Moreover, besides the judge's third-person narrative, a fourth-person hovers over each one of those texts, namely the authority of the school itself, together with its juristic typology and hermeneutic circles.[8]

Writing—and in particular when linked to an *official and religious* institution like the sharī'a courts—could only be efficient via a deadly routine.

7. Foucault noted that the notion of "author" is even more problematic in the case of "individual" authors of a well-known literary work; in such cases, the specific discourse of an "individual," however "original," cannot be isolated from the more general discourses that transcend disciplines and literary genres. See Foucault, *Archaeology of Knowledge,* 23-30.

8, Eduardo Silva-Romero, *Wittgenstein et la philosophie du droit* (Paris: Presses Universitaires de France, 2002), describes various legal practices in terms of corresponding "juridical language games" (*les jeux du langage juridique*), or "grammars," which is similar to the approach adopted in this study. The author does also suggest the various shifts between third- and fourth-person singular, the latter being that of the "legislator" or "magistrate."

Each court document perseveres in its being through this massive repetition, from previous documents, in a powerful process of mimesis of a limited number of words, statements, and above all, syntax. Yet, despite this massive repetition, the document is *identified* with the (Ḥanafī) qāḍī's name (*ism*), signature (*tawqī'*), and seal (*khatm*). Even though the name, signature, and seal are not repeated at the beginning of each document, the text nevertheless reminds its "readers" (to whom was it addressed in the first place?) that all three are inscribed *a'lāhu,* "above," at the beginning of the register. The *sijill* itself is drafted so that the blank areas are reduced to their minimum and the cases squeezed one to the other, probably to make sure that no one would add anything to the original text, thus giving the *sijill,* which is devoid of modern typographic punctuation marks and the like, the look of a "text" running forever without any *pause*—only the list of witnesses separates one case from the next. So do the name, signature, and seal identify the text with the person? The *ḥākim shar'ī ḥanafī,* whoever he might be, never speaks (or even introduces himself) in the first-person singular (or plural); it is, throughout the document, a third-person singular that establishes the *authority of the text.* This "authority of the text" manifests itself in a series of "literary devices," beginning with the "neutral" third-person; and the "factual" lists of names and property listings; to the quasi-utterances performed in court and which the text pretends to quote verbatim. So, as soon as the qāḍī introduces himself, he is already concealing his identity in the document. Do the documents then have a "personal style"? Could they be "identified" with an "author"? Should we organize those texts into different categories, according to author, style, and judicial methodology? And if it turned out that the name of the judge which "opens" each register was a legal scholar whose name identifies to other pieces of writing, should we then see the court documents in light of those other texts? Or should we consider them as "autonomous" on their own?

For our purposes here, such questions are less relevant than they might seem. To begin with, the identification of the judge in terms of name, signature, and seal, is not part of a process of *individualization* but only that of an identification with a source of authority. This qāḍī does "represent" an institution, but his power of "representation" does not necessarily create a dynamism to "individualize." Indeed, the judicial apparatus would like to minimize any possibility of individualization. Beyond that—and the court documents selected in this study do reflect my point—there is little use in categorizing documents according to style and author. Such an approach might be rewarding when dealing with legal treatises and the like but proves of little help for documents reproduced by the thousands. I will therefore assume that the textuality of the court documents is "discursive" in the sense that there is a "discourse" to *all* court documents which goes beyond the particularities

of the texts themselves. This does not imply, however, that rulings were more important than judges; on the contrary, the personalities of the judges, social links, wealth, status of learning and prestige, in short, all economic and cultural capital combined, mattered a great deal—at least more than the ruling itself. But this was all wrapped up in a discourse where the individuality of the judge mattered little so as to render the ruling totally impersonal; judges also very rarely referred, if at all, to each other's final rulings, but only to opinions by muftīs, which they sought for in "hard" cases and often quoted verbatim, in addition to opinions by well-known Ḥanafī jurists. Overall the system was open to accept new or modified judicial practices that became necessary to bridge the *hiatus irrationalis* between the concepts of the legal doctrines and the practice of the courts, on the one hand, and customary practices on the other.

The uniformity of the court documents stems in part from the fact that we are dealing with brief "summaries" of long and complex hearings (at least in civil litigations). Compared to the files, transcripts, and videotapes available for modern judicial hearings, the sharī'a court records appear thin and uninteresting. One might argue that the summary nature of sharī'a court documents makes it difficult or impossible to recover the original statements and motivations of the litigants. The "summaries," according to this view, are distorted because they are merely the qāḍī's re-presentation of the hearing in his own words. But this argument applies equally to the modern recording of hearings, which inevitably involves some form of "summarizing" or "editing." To my mind, the "summaries" of the sharī'a courts should be viewed as a "medium" through which we may enter the world of the Ottoman judicial system. Austin's linguistic category of "performative utterances" points to the fact that when we act and speak, say, in a court, we are not simply reporting on something that is already fixed in the world, we are actively constituting it, replicating it, and reinforcing it. My view of the sharī'a court texts (not to mention the minutes of the regional councils and sultanic ordinances) is one of "performance," and, as I show in an analysis of a single case (C 8-2), court utterances do not simply report and name, they perform.

The notion of an "anonymous author" leads, in turn, to that of "context," because a "textual analysis" of documents dares to sustain itself exclusively from the "text." Although "textual analysis" assumes that the logic of drafting a document may be reconstructed from the document itself, we need not take literally Jacques Derrida's claim that "there is nothing outside the text." Social history perhaps may supply us with the desired contextual basis, first, by shedding light on the individuals, families, and groups who appeared in court in order to re-negotiate their social status, and second, by its unique ability to contextualize the particular historical period to which the document

belongs. A "textual analysis" of court documents may, in turn, transform the enterprise of writing social history inasmuch as the reading of documents in a new light may have an effect on the manner in which data are collected from court documents and other sources.

My general approach to legal systems may be described as "constructivist" in the sense that the judiciary is treated as a discursive system with its own epistemological foundations.[9] I maintain that the judiciary is totally "constructed" by language and that there is no "external reality" that lies "outside" this language. A textual approach to the sharī'a court documents is appropriate because it is the language of the courts as a social construction that makes the existence of the judicial apparatus possible. In most (if not all) legal systems, the essence of the judicial lies in the language of the courts and the discourses of jurisprudence; thus, an analysis of such discursive practices allows us to reconstruct the foundations of the system.

The Maronitism of the Shihabs

Mount Lebanon had been under nominal Ottoman rule since 1516, at which time it was ruled by the House of the Ma'n.[10] In 1697, Emir Aḥmad, the last scion of the House of the Ma'n, died without leaving an heir, and political power was transferred to the Shihābs. In the eighteenth century, a series of Shihābī emirs ruled Mount Lebanon, but it was only with the accession of Bashīr II in 1788 that the House achieved the grandeur that made it memorable.

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9. See Gunther Teubner, "Pour une épistémologie constructiviste du droit," *Annales ÉSC* 47, (1992): 1149-69.

10. For a detailed history of the Shihābs in the eighteenth and nineteenth centuries, see Mikhāyil Mishāqa, *Muntakhabāt mina al-jawāb 'ala iqtirāḥ al-aḥbāb*, Asad Rustum, ed. (Beirut-Jounieh: Manshūrāt al-Maktaba al-Būlisiyyah, 1985), English trans., *Murder, Mayhem, Pillage, and Plunder. The History of the Lebanon in the 18th and 19th Centuries*, translated from the Arabic by Wheeler M. Thackston, Jr. (Albany: State University of New York Press, 1988). For a social and economic history of Mount Lebanon during that period, see Iliya Harik, *Politics and Change in a Traditional Society, Lebanon, 1711-1845* (Princeton: Princeton University Press, 1968), and Dominique Chevallier, *La société du mont Liban à l'époque de la révolution industrielle en Europe* (Paris: Paul Geuthner, 1971). An interesting case for the implementation of the *iltizām* tax-farming system in Mount Lebanon prior to its adoption in the rest of the Ottoman Empire is made by Abdul-Rahim Abu-Husayn, "The *Iltizām* of Manṣūr Furaykh: A Case Study of *Iltizām* in Sixteenth Century Syria," in *Land Tenure and Social Transformation in the Middle East*, ed. Tarif Khalidi (Beirut: American University of Beirut, 1984), 249-56. For a study of nineteenth-century Beirut waqfs based on the Ottoman court records, see Ḥassān Ḥallāq, *Awqāf al-muslimīn fi Bayrūt fi-l-'ahd al-'uthmānī* (Beirut, 1985). On the effects of silk manufactures and trade, see Akram Fouad Khater, "'House' to 'Goddess of the House': Gender, Class, and Silk in 19th-Century Mount Lebanon," *International Journal of Middle East Studies,* 28 (3 1996): 325-348.

Bashīr II's rule ended in 1840 with the Egyptian withdrawal from Bilād al-Shām. He was succeeded briefly by his cousin, Bashīr III, whose unsuccessful reign completed the demise of the Shihābs in 1841.

The Shihābs were composed of two "clans," the Ḥāṣbayyā and Rāshayyā. Originally Sunnīs, certain branches of the two clans gradually converted to Maronite Christianity (an eastern version of Catholicism affiliated with the Church of Rome since the middle of the sixteenth century), beginning with the sons of Emir Milḥim (r. 1729-54). Emīr Bashīr II was born Christian, but he concealed his religion from his Ottoman rulers so effectively that very few were aware of his beliefs, although some Ottoman officials and rivals of the Shihābs questioned his unwillingness to make his religious opinions public.[11] Many suspected him of being a Maronite. Other branches of the family adhered to Sunnī Islām or lived so closely to the Druze that they came to be identified with them. Some, in fact, converted to the Druze faith.[12]

Conversion to Maronite Christianity was particularly attractive to politically ambitious groups in Mount Lebanon. By the sixteenth century, even though the Maronite Church had a semblance of hierarchical order, it was in reality more simple and personal than it appeared. For one thing, relations among the clergy were highly personal and not much depended on education or training—even in the religious domain. Since the seventeenth century, the Maronite Church went through a gradual process of organization and "rationalization" and became a driving force in the society of Mount Lebanon. It was only by the end of the eighteenth century, due to a strong influence from the Catholic Church in Rome, that the Church had become the largest, the most organized, and the wealthiest organization in Mount Lebanon.[13] The links established by the Maronites with the Church of Rome and the Catholic and Jesuit missionaries, and, in the nineteenth century, with the Protestants, made them more accessible to the "protection" of the superpowers, especially the French. This led to the formation in 1920 of the Grand Liban as a sovereign entity

11. Mishāqa, *Murder, Mayhem, Pillage, and Plunder,* 125.

12. Mishāqa, *Murder,* 289, nt. 35 (translator's note).

13. Hariq, *Politics,* 75-127. The evolutionary process of the Maronite Church between the sixteenth and nineteenth centuries could best be described in terms of a "rationalization" process (in the Weberian sense). In the sixteenth and seventeenth centuries, the Church was still scattered all over Mount Lebanon with a poorly organized and educated clergy, and with strong links to the *muqāṭa'jī*s families. For those tax-farmers families, competing for a religious post was a way to enhance their own prestige and status. By establishing large endowments in the form of milk and waqf, and by becoming the wealthiest institution in late eighteenth-century Mount Lebanon, in addition to the more professional training granted to its clergy, the Church became more "autonomous" and better organized (in terms of hierarchy and structure). The "autonomy" of the Church implied mainly fewer connections with the *muqāṭa'jī*s families, a process that was to be even more visible during the nineteenth century.

separate from the Syrian hinterland; in addition, throughout the nineteenth century, the Maronites had access to new technologies for their manufactures and to education for their children in the newly established missionary schools. Being Maronite was a privilege in Lebanese history—up to a point.

Maronite law

Not much has been added to our understanding of "Maronite law" since the publication in 1933 of Ibrahim Aouad's *Le droit privé des Maronites.*[14] Aouad, profiting from what was probably a secure period for the Maronites under the French Mandate, had access to an eighteenth-century manuscript by an Aleppine monk and jurist by the name of 'Abdullah Qara'lī who had completed in 1720 a *Mukhtaṣar al-sharī'a wa-l-fatāwī,* a copy of which Aouad was able to consult at the Maronite Patriarchate in Bkirki, and which he refers to as "l'Abrégé du Droit." Since the *Mukhtaṣar* was never published, and not subject to any careful study besides Aouad's, our knowledge of "Maronite law" is not much better than that in *Le droit privé.* Indeed, the tumultuous history of modern Lebanon and its recent civil war (1975-1990) have led to a closed archival system whereby a "national archive" center is missing, while each religious "community" secretly and jealously keeps its own treasures, so we are literally limited to what Aouad is offering us as "Maronite law" without the privilege of accessing any of the primary sources.

Aouad refers to "Maronite law" as a "private law (*droit privé*)" system, but the "private" qualification could prove misleading. In what way was such a legal code "private"? Since Aouad did not openly address the issue, I can only think of two possibilities: 1) the Maronite system was private because it was primarily concerned with personal status matters, that is, marriage, divorce, property, and inheritance. In other words, it provided the Maronites with specific aspects of personal status legislation which Ḥanafism would have made unacceptable due to religious differences and because both systems were rooted in divine ordinances;[15] and 2) the Maronite system was thus "private" vis-à-vis the more "public" Ḥanafī practice and Ottoman qānūn; thus, while the former was limited solely to personal status matters, the others, besides their concern with personal status, included state (public) legislation as well. On both grounds, however, the "privacy" logic fails. For one thing, what was

14. Ibrahim Aouad, *Le droit privé des Maronites au temps des Émirs Chihab (1607-1841)* (Paris: Librairie Orientaliste, 1933).

15. In contemporary Syria, Christians and Jews must follow Islamic law in most personal status matters, in particular property and inheritance.

unusual about the Maronites was a Church that controlled "society"—taxation, property, and the law. Indeed, the relative differentiation of functions between the religious, legal, and bureaucratic that the majority of the inhabitants of cities like Aleppo and Damascus took for granted, were all enmeshed into one for the Maronites. Thus, even though the religious, legal, and bureaucratic (taxation, conscription, etc.) functions were not totally differentiated for the bulk of the Muslim populations of the cities and their rural areas (and for non-Muslims as well)—at least not in a modern western sense—they were nevertheless distinct from one another as institutional functions, and to the subjects of the empire as well, including for a majority of non-Muslims, where such institutions implied different authorities and bargaining procedures, which they often subtly used against one another in their daily routines. With the Maronites, however, religion, taxation, property ownership and its transfer, and, above all, the law, were all controlled by the Church. And since monks and bishops were for the most part recruited from the poorer families, the clergy's control over the peasantry was also strong to the point that the *ʻĀmmiyyah* uprisings in the 1820s are often analyzed in terms of a clergy that manipulated its peasantry in order to weaken the power of the local notables.[16] Only the power and prestige of the big families, and more specifically their *muqāṭaʻjī*s, acted as an institutional intermediary between the Maronite Church and its subjects, the peasantry in particular. The Church's quasi-monopoly throughout the Ottoman period was mostly challenged by the two Maronite houses that exclusively held the highest title of *amīr,* the Shihābs and Abillamaʻs,[17] at a time when powerful families, such as the Khāzins, traditionally associated with the Church, slowly declined.[18] In fact, when alliances and hierarchies

16. For a brief survey of the 1820 events and their historiography, see, Samir Khalaf, *Persistence and Change in 19th Century Lebanon* (Beirut: American University of Beirut, 1979), Chapter 3.

17. Only one Druze family, the Arslāns, held the title of amīr. The Shihābs, which were originally Sunnis from the regions of Ḥāṣbayyā and Rāshayyā, had some of them convert to the Maronite faith (that is, Catholicism) in the eighteenth and nineteenth centuries, even though that was kept, in some cases, most notably for Bashīr II, "confidential."

18. See, Richard van Leeuwen, *Notables and Clergy in Mount Lebanon: The Khāzin Sheikhs and the Maronite Church (1736-1840)* (Leiden-New York: E.J. Brill, 1994), which, despite its merits, is heavily influenced by the world-economy and integration to capitalism literature, thus leading to a common assumption that in Ottoman historiography and "in the final analysis," as the good old Marx would say, the "socio-economic patterns," falsely assumed as "secular," "dominate" and shape the religious, moral, and kin relations: "There are few things which are more revealing about power structures in societies than the relations between secular and religious institutions. That is, if one is willing to accept the idea that these relations are a reflection of socio-economic patterns and not only inspired by piety or moral concerns" (p. 1). But were the "socio-economic patterns" in the societies of the Ottoman empire "secular"? If we assume that the socio-economic was, in part at least, a set of legally regulated institutions, and that sharīʻa law is by definition deontological, on what basis was the socio-economic then secular? Why was there no autonomous discourse of political economy?

were reestablished after the crucial battle of ʻAyn Dāra in 1711, the nobility became gradually dominated by the Shihābs who, under Bashīr II, were the sole rulers in Mount Lebanon. The rule of Bashīr II was in particular the most revealing for our purposes here since it was during his reign that an attempt was made to create a single legal system for Mount Lebanon as a whole, a step that paralleled the emir's desire to centralize politics and simply rule as an "Emir" rather than as a religious chieftain.

A document that Aouad reproduces and translates in his book is quite revealing. On July 19, 1744, a declaration, drafted in Arabic, and adopted and signed by the Maronite Patriarch Sīmān ʻAouad and nine archbishops, stated that from then on each bishop would be the sole judge in his own diocese, and no other bishop could substitute in a colleague's place unless an authorization to do so has been granted from another diocese. Having first limited the jurisdiction of a bishop to his own diocese, the declaration then confines all source of legislation to Qara'lī's *Mukhtaṣar* only.[19] Finally, the document specifies that any legal consultation, referred to as *kitāb al-qāḍī ila-l-qāḍī* in Islamic law, ought to be completed in writing. Supposing that such measures were effectively implemented, as Aouad suggests they were, they reveal all by themselves the main differences with sharīʻa adjudication. Maronite law did not operate within a distinction between a religious and legal space; the bishop was himself judge; and a single non-published and secretly kept manual was the sole source of legislation for over a century. That would not have been possible had the Maronite Patriarch not enjoyed an almost complete autonomy over his territory, an autonomy which ironically was only to be threatened by the growing power of the Shihābs, which in turn, with the upper nobility, came under increased pressure and intrigues from al-Jazzār's governorship in Sidon (1776-1804)—that period, however, was an exception to Turkish involvement that proved to be more personal than institutional.

Protected by their autonomy, the Maronites were thus able to create a legal system of their own, hence bypassing the more traditional route of the sharīʻa courts. Yet, in the absence of Maronite "court" records open to researchers, the bishops' adjudication in their own dioceses could only be the subject of speculation. Moreover, the existence of such a system did not prevent Maronites (and other Christians and Jews) from using the sharīʻa courts, in particular for land-transfers. To be sure, Maronite law was a conglomeration of codes that were prominent in the region at one point or another, from Canon Law, and the Roman-Byzantine codes, to the sharīʻa, and, in the entourage of Bashīr II, some of his scholars, such as Shaykh Nāṣīf al-Yāzijī, were known to

19. Aouad, *Le droit privé,* 308 for the original document, and 309 for the translation.

adjudicate in the four madhāhibs. Moreover, unlike the sharīʿa, Maronite law was not a massive deontological effort to ground everyday life into morality and religion. It rather represented the effort of a "community," which at different times in its history felt threatened by more powerful neighbors, to create a quasi-legal code for the most pressing matters, in particular personal status, successions, land-ownership, and other related issues such as lease contracts and the rightful "occupation" of "dead" lands; in addition to commercial and penal matters. By far the most important differences between Maronite and sharīʿa law consisted, first, in the unlimited ability of testators to draft wills according to their own wishes and desires, even if that implied prohibiting their own sons and daughters from their succession, while Muslims could not transmit more than one-third of their properties to non-legal inheritors; then, second, when no will was left, the daughters, and women in general, were totally left out of their father's inheritance and only the brothers enjoyed that privilege. Needless to say, those two factors combined created, at least until the first decade of the nineteenth century, a different dynamic of land-ownership between the Maronites, on the one hand, and the Druze, Shīʿīs, and Sunnīs, on the other. No wonder then when very early in the nineteenth century, Bashīr II attempted to enforce a common code based on the sharīʿa, the Maronites felt directly threatened both in the domains of land-ownership and family relations. In 1803, the Patriarch Yūsuf Tiyyān consulted the pope on the new legal system imposed on the Maronites, and the pope's reply seems to have indeed been compromising thus proposing to the Maronites to follow "local sharīʿa law (*al-sharīʿa al-waṭaniyya*)" on the proviso that Christian morality be respected (in particular the sacredness of marriage).[20] Aouad claims, however, that despite Bashīr II's prescriptions and the pope's compromising response to the clergy, the Maronites were able to maintain their local custom of leaving girls without inheritance ("*le non-héritage des filles*") at least until the demise of the Shihābs in 1841.[21] But it was only in 1884, under the reforms implemented by the *mutaṣarrif* of a unified Mount Lebanon, that the clergy lost control of its domination over the legal.[22] It is uncertain, however, how much control, in this tumultuous nineteenth century, despite various political measures to curb Maronite law, was the clergy effectively able to maintain over its own customs, in particular those related to the non-inheritance of women in general.

20. Aouad, *Le droit privé,* 60; Sulaymān Taqiyy al-Dīn, *al-Qaḍāʾ fī Lubnān* (Beirut: Dār al-Jadīd, 1996), 26-27.

21. Aouad, *Le droit privé,* 61.

22. Aouad, *Le droit privé,* 74.

Be that as it may, and in relation to all of the six Shihābs' cases in this study (C 3-1, 5-1, 5-2, 6-1, 7-1 & 7-2), beginning with the inheritance of Bashīr II himself (C 5-1), what is of interest to us here is the degree of latitude that the Maronites enjoyed in their property-transfers. Forbidden by their laws and customs to transfer property to their married daughters unless specified by will (nuns, however, did inherit from their fathers), Maronite males were nevertheless open to the possibility of transferring properties to women thanks to the legal devices (*ḥiyal*) of the Sunnī courts. Even though all six cases go back to the 1840s to the early 1860s, right after the political demise of the Shihābs, a period in which intense legal reforms had just been inaugurated, it does seem, however, that the Maronites sought the Ḥanafī courts on a regular basis, in particular whenever a female inheritor or beneficiary was the only alternative (for example, when no male inheritors or beneficiaries were available, or simply to protect the property from political confiscation). In order to circumvent limitations imposed by both legal systems—Maronite law left married women without inheritance, while Ḥanafism left them with half the males' shares—Maronites wishing to transfer all their properties to women (or keep them as administrators to family waqfs) had to find a workaround within the flexibility of Ḥanafī practice itself. That implied, among other things, the use of fictitious litigations (Table 2-2 *supra*), which, as noted throughout this study, were the norm in the nineteenth century and were no more than simulated contractual settlements. Waqfs in particular were an opportunity for Maronites to consolidate family land ownership, while milk lands were often the object of fictitious sales ("*ventes fictives*").[23] Since Ḥanafism did not require that a waqf's testator includes his own wife and daughters among the beneficiaries, Maronites used the sharī'a courts to first maintain the non-ownership of their women, thus following an "opportunity" provided by the Ḥanafīs, but then a fictitious litigation would typically turn in favor of a woman-defendant that would end up "winning" her case by maintaining her administrative role over the waqf's properties of her husband (C 6-1). In short, the sharī'a courts provided the Maronites at times with the opportunity to bypass the limitations of both legal systems, their own and Ḥanafī practice, thus keeping their properties within the family, with as little fragmentation as possible, while passing them from one generation to the next on this basis of minimal property dismemberment. Hence, in the absence of a more general state-controlled code, individuals and their families were able to shift between various systems whose normative values could even prove incompatible. The

23. Aouad, *Le droit privé,* 217. There is no clear indication, however, as to whether those "*ventes fictives*" were completed in the sharī'a courts only, or with the help of Maronite bishops, or both.

various customary practices thus proved to be simulacrums of the regional codes that the social actors often bypassed. Many court practices simulated those of the Ḥanafīs by presenting themselves as conforming to their ideals and spirit, which they did in principle—at least formally, in the sense that the law was not misused. In fact, there was nothing "illegal" or "against" the law in fictitious (simulated) litigations. As we shall see in detail once cases are analyzed and their logic followed, property transfers followed grosso modo two different paths: 1) in the case of privately owned lands, milk, lots of properties were transferred within a family, and in particular on a generational basis, thanks to fictive (simulated) sales between alleged plaintiffs and defendants (as exemplified in the case of the estate of Bashīr II, C 5-1). Ḥanafī practice, by consenting that oral contracts of sale were fully legal, thus rendering written contracts altogether optional, made fictitious sales even simpler: in the absence of a written document, only two witnesses were needed to confirm, years later, to a court, that a sale effectively took place. 2) The transfer of waqfs followed a logic of its own, different from milk, even though the general purpose was the same—the preservation and consolidation of familial property, to which I will refer as "the three-founders" device (as exemplified in the waqf of Bashīr III, C 6-1). To establish that a waqf was irrevocable, the founder must first identify the property, which in principle should be milk, then appoint an administrator. He would then bring an action against his trustee on the basis that "he changed his mind," thus requesting the return of the waqf's administration to himself, and citing in the meantime Abū Ḥanīfa's opinion on the revocability of a waqf. The judge, citing in turn Abū Yūsuf's and Shaybānī's opinions on the irrevocability of waqfs, would rule in favor of the defendant-trustee (administrator). Besides establishing a trust in perpetuity, thanks to a judge's ruling, this legal device acknowledged that the properties were indeed waqf, that is, originally the property of the founder. In fact, nothing was more uncertain than the original status of all those Mount Lebanon properties. Again, here, the allodial nature of those properties was "proved" by bringing two witnesses to court rather than establishing it by means of a written certified document. As a result, many of the Mount Lebanon properties, whose status was uncertain (mawāt, mīrī, church waqf, "occupied" by peasants, etc.), might have changed hands at some point in the nineteenth century, if not earlier.

To be sure, Ḥanafī practice provided the propertied Maronites with more leverage over the small property landholders that were limited to their community's laws and customs. Thus, barely two decades after the implementation of Ḥanafism by the Shihābī bureaucracy, the Patriarch Yūsuf Ḥubaysh wrote in 1826 to the *Sacra Congregatio De Propaganda Fide* (usually named "Propaganda") in Rome, an institution that "was founded in

1622 to exert jurisdiction over all the missionary regions, including those in the Ottoman Empire,"[24] expressing his fears regarding the insecurities brought to the Maronite family as a result of submitting his community to Ḥanafī practice.[25] That could be an indication that 1) the adoption of Ḥanafī practice in 1803 as a common legal system for all the communities of Mount Lebanon was probably the most decisive bureaucratic measure imposed by Bashīr II; and 2) the implementation of Ḥanafism must have had a mixed effect on the Maronites, as witnessed by all the complaints addressed by the successive Patriarchs to Rome. Considering that Maronite penal law was a limited domain that at best implied corporeal punishment, and that no jurist ever admitted interest-loans, even though usury was practiced among Maronites,[26] and that the waqf institution was quite widespread (at some point, the church owned one-fifth of the properties as waqf), the major drawback for the Maronites in the implementation of Ḥanafī practice was hence limited to successions and inheritance only: 1) the free-will system was definitely a lost advantage, and 2) the non-inheritance of married women kept property consolidated within the family. There was also a geographical disadvantage: rather than settle a lawsuit in a local diocese, the Maronites were forced to use since 1803 the Ḥanafī courts in Tripoli, Sidon, and Beirut, and at times Damascus.

Representations of non-Muslims

In the chapter on the "wills of minorities" (*waṣāyā al-dhimmī*), Ibn ʿĀbidīn divides those wills into the legal and illegal.[27] Wills are legal through consensus (*ittifāq*), when, for example, a non-Muslim identifies in his will a place that is sacred to both Muslims and dhimmīs (*awṣa bimā huwa qurba ʿindanā wa ʿindahum*), or if he wills to be buried in Jerusalem. Thus, consensus in this context implies that the sacred place denoted in the will be shared by both Muslims and dhimmīs, and this all by itself legalizes the will.

When a dhimmī transforms his home, prior to his death, into a church with the hope of registering it as a waqf, it is nevertheless considered as a property to be inherited (*mīrāth*) rather than as a waqf because, first, it has not been erected as a waqf, and second, a church could not be equated with a mosque because Christians pray and bury their dead in a single space, which is sinful in Islam. But even if the mosque had had a function similar to that of a church,

24. van Leeuwen, *Notables,* 110.
25. Aouad, *Le droit privé,* 215.
26. Aouad, *Le droit privé,* 65, 285.
27. Ibn ʿĀbidīn, *Radd,* 6:696-99.

as a combination of house of prayer and cemetery, it would have been destined to be inherited in parts (*yūrathu qiṭa'an*) because it cannot be transferred in a pure form to God. In other words, only pure spaces could be transformed into waqfs, a rule that even renders churches inadequate for that purpose and limits them to inheritance only.

Dhimmīs, like all Muslims, can dispose in their wills with only one-third of their properties to non-legal beneficiaries as they please, while the remaining two-thirds should follow the Islamic rules of inheritance. Thus, if a dhimmī erects a church in his neighborhood, and then dedicates it in his will specifically to someone, only one-third of this church could be legally inherited by that specified person or institution.

Wills from a dhimmī to a Muslim and vice versa, which are based on prior consensus (*ittifāq*), are legal because dhimmīs share an equal status in pecuniary transactions (*mu'āmalāt*). Thus, if a dhimmī wills in favor of a Muslim, the Ḥanafīs give three options:

1. If the bequeathed is a pious act (*qurba*) for both Muslims and dhimmīs, such as helping the poor (Muslims and/or dhimmīs), or helping in the construction of the Aqṣa mosque in Jerusalem, or the construction and maintenance of a school or hospital, all such acts are accepted as pious for both Muslims and dhimmīs, and hence their inclusion in wills is legal.
2. If the bequeathed is a pious act for Muslims but non-pious for dhimmīs, such as the building of a mosque, then the will of a dhimmī that includes a mosque among its properties is illegal because the willed act is not pious in the eyes of God.
3. Finally, if the bequeathed is a pious act for dhimmīs but not for Muslims, such as the construction of church or holy place, their wills are legal because they are pious according to the dhimmīs. There is no consensus, however, among jurists over Abū Ḥanīfa's opinion on that matter, and some considered such wills to be illegal because they are sinful in the eyes of the sharī'a.

Thus far the logic is quite obvious: dhimmī wills are legal as long as the bequeathed is pious for Muslims and/or dhimmīs, and basically, the same rules apply to waqf endowments as for wills and inheritance. Thus, for a dhimmī waqf to be legal, it should be considered as pious (*qurba*) for both Muslims and dhimmīs, such as waqfs devoted to the poor or the Aqṣa mosque. However, since mosques are not for dhimmīs pious objects, they are, from the standpoint of the Ḥanafīs, illegal as waqfs whenever erected by dhimmīs. In general, therefore, whether a property is milk or waqf, dhimmīs basically shared the same rules as their fellow Muslims, and for both religious groups a fundamental condition is that the bequeathed property should be pious *for that specific religious group*—and not simply from the vantage point of view of Ḥanafī practice—for it to be legal.

In conjunction with all six Maronite cases in this study whether milk (C 5-1 & 5-2) or waqf (C 6-1), the properties were mostly either lands involving plantations or crops, or else included homes and shops, so that they did not pose problems regarding their pious character. At one point, however, Bashīr III's waqf (C 6-1) stipulated that the beneficiaries, if no male descendants were available, be among the Maronite poor in Mount Lebanon. But such a clause did not pose any particular problem for the Ḥanafīs, nor did the fact that dhimmīs were settling their waqf and milk disputes in the context of a Ḥanafī court in Beirut. In fact, dhimmīs probably opted for the Ḥanafī courts either to be granted property privileges that were not permitted in their own codes, or else to place their properties into more secure legislation within the officially recognized courts of the empire. The Maronite cases in this study, therefore, do not all by themselves point to any special legislation regarding dhimmīs. They rather underscore that dhimmīs came to the Ḥanafī courts precisely to be treated like their compatriot Muslims.

Family disputes

The alleged dispute over the estate of Bashīr II—which occurred in 1857, sixteen years after the House of the Shihābs had lost all political power—may reflect the tumultuous history of the family. Coming at a time when the political power of the House of the Shihāb had been severely shattered, it represents another instance of Maronites using the Ḥanafī courts of Beirut for the purpose of transferring property. Indeed, unlike other urban "minority" groups in the Bilād al-Shām (whether Muslims or non-Muslims), the Maronites had their own laws and courts controlled by their clergy. However, their reliance on the Ḥanafī courts did not secure them an independent status. Rather, Ḥanafī dogma was applied to them as if they were Muslims, as this case and others demonstrate (at least concerning property and inheritance matters), and that was precisely what those seeking Ḥanafī courts wanted—an opportunity to bypass the limitations of their own communal laws.[28]

28, On the legal status of "minorities" in Islamic societies, see Antoine Fattal, *Le statut légal des non-Musulmans en pays d'Islam* (Beirut: Imprimerie Catholique, 1958). To the best of my knowledge, during the Ottoman period, the Christians and other Muslim and non-Muslim "minority" groups in Beirut, Damascus, and Aleppo, and unlike the Maronites and Druze in Mount Lebanon, had no courts of their own and had to rely on the Ḥanafī courts to settle their disputes (so did the Maronites, but by choice). I am not aware, for the same cities and period, of courts specific to the Jews either, even though it has become common knowledge that, in many Ottoman cities, the Jews had the unique possibility to shift between rabbinic law and Ḥanafī dogma, see Aryeh Shmuelevitz, *The Jews of the Ottoman Empire in the Late Fifteenth and the Sixteenth Centuries* (Leiden: E.J. Brill, 1984), Chapter 2.

Unfortunately, little research has been conducted on the status of property in Mount Lebanon during Ottoman times, and it is therefore difficult, within the limits of individually analyzed texts, to estimate how representative each case is even though my choice of documents followed some of the most common court procedures for that period, many were indeed nothing but common "techniques of fictitious litigations."[29] The list of properties belonging to the estate of Bashīr II, together with their surrounding properties and proprietors (see Table 5-1), provides a rough approximation of the type and distribution of properties in Mount Lebanon.

The wives of Bashir II

In his history of Mount Lebanon in the eighteenth and nineteenth centuries, Mikhāyil Mishāqa presents a vivid description of Emir Bashīr II's marriage to a Shihābī widow from Ḥāṣbayyā.

> When Emir Yūsuf summoned his maternal uncle, Emir Bashīr, from Ḥāṣbayyā, and treacherously killed him, he authorized the young Emir Bashīr [II] . . . to sequester the possessions of the murdered Emir Bashīr. He went to Ḥāṣbayyā and, while accomplishing his mission, saw the murdered man's widow, who had borne him two daughters, Khaddūj and Nasīm. She was Lady Shams al-Murīd, sister of Emir Qa'dān, who resided in the village of 'Abayh in the Upper Gharb of the Lebanon. At that time the members of [the Shihāb] family married amongst themselves and were unconcerned with a difference in religion, so the [Ḥāṣbayyā Shihābs] married daughters of, and gave their own daughters in marriage to, the emirs of the Matn, even though at that time they were Druze and were only gradually converted to Christianity . . . When Emir Bashīr Shihābī saw this widow's beauty, he determined to ask for her as a wife. He married her, and she later bore him three sons, Emir Qāsim, Emir Khalīl, and Emir Amīn.[30]

Lady Shams al-Murīd, Bashīr II's first wife, was the sister of Emir Qa'dān Shihāb (d. 1813) and hence a cousin of Bashīr II. She also was a direct descendant of Emir Milḥim, who had ruled Mount Lebanon between 1729 and 1754, and a cousin of Emir Yūsuf (r. 1770-88). In terms of genealogical affiliations, she was well-situated within the Shihābs, and, more importantly, as a direct descendant of Emir Milḥim, she would have been especially "attractive" to the young Bashīr II, himself a descendent of Emir Ḥaydar (r. 1706-29). As the citation from Mishāqa indicates, the various factions of the Shihābs intermarried among themselves, observing the "rule" of endogamous

29. See Table 2-2 *supra.*

30. Mishāqa, *Murder,* 23.

marriage, that is, marriage with a father's brother's daughter (*bint al-'amm*). Exogamy existed as an alternative, but generally was restricted to families within the same confessional group; practically, it resulted in alliances with alien families and in the subordination of weaker to stronger families. Exogamy was a form of "exchange" because a weak family could give its women to a stronger one in exchange for recognition and prestige. Dominique Chevallier has noted that, in nineteenth-century Mount Lebanon, exogamous marriages greatly outnumbered endogamous marriages *stricto sensu,* that is, marriages between parallel cousins.[31] The endogamic "rule" seems not to have been respected among lower-ranking families. Following or not following the "rule" was a strategy, because the choice of exogamy entailed making alliances with families that were "outside" the clan and possessed a different rank and status.[32]

In his first marriage, Bashīr II had chosen a woman from inside his family. In the document under analysis **[C 5-1]**, Bashīr II's wife is identified as "Lady Ḥusn Jīhān bt. 'Abdallāh the Circassian,"[33] suggesting that his second wife was an "outsider."[34] Otherwise, the document presents no further evidence on Ḥusn Jīhān (she is never mentioned in the Mishāqa story). The one thing we know for certain is that Bashīr II and his Circassian wife had two daughters, Sa'da, who was the plaintiff in our first case below (C 5-1) and then, again, plaintiff and then defendant in the following case (C 5-2);[35] and Su'ūd, who unlike her

31. Chevallier, *La société du mont Liban*, 69: "L'exogamie n'en a pas moins existé comme autre terme d'une alternative, terme qui a permis au groupe de s'ouvrir sur l'extérieur. Les unions exogamiques ont représenté une proportion plus ou moins variable du total des mariages selon le rang et le statut des lignées, le nombre moyen d'enfants par couple, les facilités ou les difficultés qu'ont eues les groupes villageois de communiquer entre eux ou avec l'extérieur, par conséquent selon les époques, les lieux et les communautés; d'une façon générale, elles ont largement dépassé le nombre des mariages endogamiques *stricto sensu,* c'est-à-dire entre cousins parallèles, car il a suffi pour assurer la permanence et la cohésion patrilinéaire de la lignée que ses responsables, et d'abord les aînés, respectassent la coutume de prendre pour épouse la fille de leur oncle paternel." Marriage with a patrilineal parallel cousin appears, in the context of Claude Lévi-Strauss's anthropology, as a sort of scandal and as something difficult to account for. In fact, unlike exogamic systems which typically assume an incest taboo and an absolute necessity of exchange between alliance groups and descent groups, endogamic systems blur the traditional lines set by structuralist anthropological discourse, see Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977), 30-71.

32. It was indeed enough, for that matter, that the oldest son respects on his own the rule of endogamy and marries his paternal parallel cousin.

33. The Circassians were an ethnic group from the Caucasus.

34. The fact that Bashīr II's three sons and his daughter, Sa'da, are the only legitimate heirs identified in the document suggests that they were his only children and that Bashīr II had no more than two wives.

35. Even though the case of Sa'da and Ḥulā Shihāb precedes that of the estate of Bashīr II by several months (May 6 and September 24, 1857 respectively), I've deliberately chosen to expose the latter first, due to the importance of the estate for one, and because it provides a better picture to the Shihābī family interrelations and the role of Ḥusn Jīhān in particular.

sister did not restrict herself to the Shihābs and married an Abillama‘. Bashīr II’s three sons from his first wife were dead at the moment of the hearing, but are mentioned frequently in the document because the estate allegedly had once belonged to them.

The identification of Ḥusn Jīhān as “the daughter of ‘Abdallāh” signifies that she did not come from one of the noble families of Mount Lebanon or the Ottoman Empire. As a Circassian, she did not belong to the Shihābs and was an “outsider.” This is significant because Ḥusn Jīhān eventually won the first case (C 5-1) and was declared the owner of the entire estate—an unusual outcome—even though she had “lost” in a previous case (C 5-2) against her daughter—in a society that placed a high value on endogamous marriages precisely, to prevent the transmission of familial property to women who were “outsiders.” However, what is “unusual” here is neither the transfer of property as such, which as a legal device was quite common, nor the fictitious nature of the litigation, but indeed the role and personality of Ḥusn Jīhān herself.

The French consul in Beirut Henri Guys had noted that the Shihābs, “which only married among themselves, were often forced to seek for Georgian or Circassian slaves, and that has not a little contributed to the nice blood which we recognize in this family. But for some time now, they allied themselves to the Abillama‘s.” And he then added in a note that “the great prince [Bashīr II] had married from within the family, and then, in a second marriage, to a Georgian[36] whom he had purchased in the slave market in Constantinople. People look very favorably at her spirituality and good heart, in particular her piety.”[37] Another contemporary observer, but close to the Shihābs, had also confirmed Ḥusn Jīhān’s Circassian origins, and that the Emir had specifically requested from jewelers to have them purchase for him three slaves, one of which he gave as gift to Emir Manṣūr, another one to his son Emir Qāsim, and he married the third, Ḥusn Jīhān, and had a priest teach her Arabic. Bashīr then transferred to her the property of his well-exposed palace in Bayt al-Dīn, still the greatest symbol of Lebanese individualism in Ottoman times, which she eventually sold and had the revenues divided among her two daughters. In all that restless activity of buying and selling, and property transfer,[38] Ḥusn Jīhān

36. The Arabic texts, including court documents, refer to Ḥusn Jīhān as a Circassian.

37. Henri Guys, *Beyrout et le Liban*, 2 vols. (Beirut: Éditions Dār Lahad Khater, 1985 (1850)), 2:101-2, and note 47.

38. Besides her active role in the two cases (C 5-1 & 5-2) analyzed in this chapter, a notice was sent to her representative in 1867 to appear in the higher court of *Mutaṣarrifiyyat* Mount Lebanon, the *majlis al-muḥākamat al-kabīr,* one of those newly established courts in an era of intense judicial reforms, with Emir Khalīl Bashīr Aḥmad as her opponent, see Sulaymān Taqiyy al-Dīn, *al-Qaḍā’ fī Lubnān* (Beirut: Dār al-Jadīd, 1996), original document reproduced on p. 52.

"has thus spent enormous amounts of money, thinking that she might become famous, and with the hope that she will eventually replace her husband and rule over Lebanon."[39] (A court case in 1866 names Jīhān's sister, 'Ushqī Jamāl, as widow to the defunct Shihābī Emir Mas'ūd b. Khalīl.)[40] Henri Guys was right for the most part regarding marriage patterns among the Shihābs: their first priority was within the group, among cousins; other leading Maronite families such as the Abillama' was their de facto second choice; and when that proved too constraining, the Shihābs opted for Circassian or Georgian slaves rather than, say, Muslim or non-Muslim women from Mount Lebanon or the Fertile Crescent. That pattern clearly points to a great suspicion held toward all marriages from outside the clan, undoubtedly created by the difficulties of political alliances, the importance of hierarchies, and the role women played in bringing families together, isolating them, or separating them for that matter. Bashīr's decision to take as second wife, after a first conservative marriage, a Circassian slave, then promoting her to high society, is an indication of how "safe" he became in his later period, thus bypassing local alliances altogether. It could well be Ḥusn Jīhān's status as an outsider to the clan, besides her own ambitions, which provided her with that noticeable power in the sharī'a courts.

Women, property, and murder

According to Robertson Smith, inheritance and blood-revenge are two sides of the same coin in the Arab world, the latter being clearly dependent upon clan membership.[41] The link between inheritance and blood-revenge is present in the story of the marriage of Bashīr II to Lady Shams al-Murīd, when the young emir was authorized to "sequester" the "possessions" of a genealogically-related Shihābī emir who had been murdered. The latter was the maternal uncle of Emir Yūsuf (r. 1770-88) who, in turn, was the paternal uncle of Emir Qa'dān and his sister Shams al-Murīd. Although Mishāqa did not explicitly link murder and inheritance in nineteenth-century Mount Lebanon in the sense understood by Robertson Smith, such a link is implied in his connecting the murder with the sequestering of "possessions," which included, of course, the murdered emir's wife. The elimination of an influential

39. Shākir al-Khūrī, *Majma' al-Masarrāt* (Beirut: Dār Laḥd Khāṭir, 1985), 239.

40. Beirut sharī'a courts, unnumbered register, 14 ṣafar 1283 (June 28, 1866), case number 328.

41. W. Robertson Smith, *Kinship and Marriage in Early Arabia* (London, 1907), 65-66; cited in Jack Goody, *The Oriental, the Ancient and the Primitive. Systems of Marriage and the Family in the Pre-industrial Societies of Eurasia* (Cambridge and New York: Cambridge University Press, 1990), 363.

opponent from the same clan—even a maternal uncle or close cousin—might facilitate the redistribution of property and wealth within the clan. In their role as widows, women were crucial to this process, for two reasons: they were viewed as exchangeable properties who brought together rival factions of the same clan; more importantly, since Muslim women are entitled to inherit, a widow will cause property to fragment unless she immediately is "taken over" by another man—even if the latter had been involved indirectly in the murder of her husband or brother.

In our case, the interesting point is that the redistribution of property meant giving the totality of the estate to a woman outside the Shihābī clan. But such a move required the approval of the qāḍī.[42] That the qāḍī might rule on such a matter without there being any written documents (*ḥujja*s)[43] corroborating Ḥusn Jīhān's purchase of the estate from her husband points *in appearance* to the broad measure of judicial discretion that the qāḍī enjoyed and to the climate of "openness" within which he operated. If, however, as I argue in this study, many of those alleged litigations were nothing but fictitious and used legal devices to confirm the transfer of properties so as to render them irrevocable, then the role of judges, their rulings, and the distribution of gender roles in court procedures should be looked upon with a degree of suspicion. In fact, the massive ownership of rural lands by the state, and the difficulties encountered in absolute ownership and in establishing the allodial status of some properties, has led to a number of court devices, which in essence are fictitious litigations whose main purpose was the reception of an irrevocable ruling from a judge. It also permitted the "disputants" to circumvent problems of illegality that their transactions might have encountered, or to get around rigid rules of inheritance and the like.

The litigants and their representatives

The document dealing with the "estate" of Bashīr II, dated 4 Ṣafar 1274 (24 September 1857), begins by identifying the Beirut qāḍī (a Ḥanafī), his "signature" and seal (*khatm*), and then the litigants and their representatives. The plaintiff, "Sa'da bt. Emir Bashīr b. Emir Qāsim b. Emir 'Umar al-Shihābī,"

42. Of course, transferring property to a woman "outside" the clan was nothing illegal, but it was unusual, and my argument throughout this paper is that because of the nature of this "friendly litigation," the transfer would not have been possible without an implicit consensus from the qāḍī.

43. The absence of written documents is not illegal in Ḥanafī practice, but since presenting *ḥujja*s in court was quite common in Ottoman times, the absence of a written legal document for a large estate proving its purchase by the defendant is staggering.

was represented by "al-Khawāja Faḍlallāh b. Yūsuf al-ʻĀzār." The defendant, the wife of Bashīr II, "Lady Ḥusn Jīhān bt. ʻAbdallāh the Circassian," was represented by Ibrāhīm Bāz, whose family had been associated with the ruling Shihābs throughout the nineteenth century as guardians of their children.[44]

The representatives, who played a key role in the case, as they usually do, were asked only to prove their relationships vis-à-vis their respective mandators in relation to the "debt" (see below) between the plaintiff and the representative of the defense. In a society where professional lawyers did not exist, individuals either came to court on their own or represented by others. But the act of representation, besides being fully contractual, concerned more than professional expertise since it involved a great deal of "trust" and personal knowledge of the "client." Moreover, even though representatives often had no formal family links to their clients, their relationship nevertheless manifested a form of a common group belonging as *ahl.* Representatives were mostly male, and women rarely came to court on their own without a representative; men also had representatives, whenever they could afford one; minors were always represented by an adult, usually kin related. Thus, the introduction of the litigants and their representatives involved more than a mere "identification." As both Clifford Geertz and Lawrence Rosen have observed, social identity is constructed in terms of familial, religious, tribal, and geographic affiliations, as reflected in a person's *nisba.*[45] Whereas the Ottoman sharīʻa courts generally referred to individual Christian and Jewish males—"minorities"—as *khawāja*s, a litigant belonging to an important family such as the Shihābs had her name associated with descendants going back at least three generations. In the case of Ḥusn Jīhān, who apparently had no place in the Lebanese nobility system, it was important to identify her, through her nisba, as a Circassian. Knowing the nisbas of the litigants and their representatives was the qāḍī's single most important preliminary task. Rosen has argued that the qāḍī expressed interest in the social origins of those appearing in front of him because he sought to return the litigants to a position in which they could re-negotiate their ties, alliances, and networks.[46] The process of nisba-identification and classification that we encounter at the

44. Mishāqa, *Murder, Mayhem, Pillage, and Plunder*, 46-47.

45. Clifford Geertz, "Suq: the Bazaar Economy in Sefrou," in Clifford Geertz et al., *Meaning and Order in Moroccan Society* (Cambridge and New York: Cambridge University Press, 1979), 150; Lawrence Rosen, *Bargaining for Reality: The Construction of Social Relations in a Muslim Community* (Chicago: University of Chicago Press, 1984), Chapter 2.

46. Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (New York: Cambridge University Press, 1989), 65.

beginning of each sharī‘a court document belongs to the larger domain of knowing the "social origins" of the litigants.

The "debt"

After identifying the litigants, the document turns to the matter of a "debt" (called *dayn* or *qarḍ* in the language of the sharī‘a courts). The plaintiff had given the representative of the defendant a specific sum of money of fifty piasters (an insignificant sum, compared to the value of the estate which was estimated at 236,000 piasters by the defendant), presumably before the hearing, although the exact date is not specified; the qāḍī instructs the representative of the defendant to return to the plaintiff the exact amount of money that he owes him; the representative of the defendant complies with this instruction, so that, in the end, money moves from the representative of the defendant to the plaintiff (and, as we shall see, from the "winners" to the "losers").

This seemingly insignificant exchange is not peculiar to this case, but rather occurs frequently in sharī‘a court litigations dealing with inheritance, property-transfer, waqf, tenancy contracts, and the like (C 3-3, 5-1 & 6-1). Considering this larger body of evidence, I note the following patterns or rules of the "game": (1) After the debt is mentioned but before the qāḍī instructs the representative of the defendant to return the debt to the plaintiff, the plaintiff asks the "alleged" representative of the defendant to prove that he had been summoned by the defendant to represent her. In response to this request, the representative generally summons two witnesses who acknowledge (swearing "by the exalted God") his proxy status with respect to the defendant. Since the representative of the defendant usually acknowledges the debt, the only technical problem left to the qāḍī was to verify that the representative of the plaintiff had been appointed by the plaintiff; (2) Once the testimony of the witnesses is approved by the qāḍī, the defendant's representative agrees to pay the "debt" to the plaintiff; and (3) The document then shifts immediately to the main issue, that of the estate, which is the true subject of the litigation (although the positioning of the debt at the beginning of the document gives the misleading impression that "this is what it's all about"). The point here is that all three steps had to be completed for the very specific purpose of confirming the identity of the representative of the defendant and his right to represent his client (step 1). To understand why such a procedure was crucial, it would be helpful to look at fictitious litigations as simulated contracts. The sole purpose in this case was indeed to confirm the defendant Ḥusn Jīhān's right of absolute ownership over the "disputed" properties. That could have been completed in a more straightforward contract of sale in which the daughter acknowledges

her mother's purchase of those properties, or else as a donation (*hiba*). But due to limitations imposed by Ḥanafī practice itself, and the ambiguous status of rural properties in general, not to mention the possibility of illegal land transfers from state to private ownership, there was a preference for fictitious litigations in order to confirm a contractual arrangement. The parties involved, which could be either kin related or not, in the final analysis were seeking for an irrevocable ruling from an accredited Ḥanafī judge.[47] That kind of ruling made it difficult, if not plainly impossible, for others, including future-generation kin members, to alter or question any aspect of the contractual arrangement and turn it to their own advantage, something that would have been more feasible in a regular contract. It was therefore essential that each step of the procedure be well "sealed" so as to render the case in toto hard to revoke, and the identity of the representative, whose client will be the "winner," was indeed one of those "sealed" steps.

It is noteworthy that neither representative appears to have come to court bearing written documents corroborating his status as a legal agent, or accompanied by witnesses who might attest to this status. It was only when the "debt" issue surfaced that witnesses were summoned. That the corroboration of the representatives' status was made by witnesses (rather than documents) points to the importance of the act of witnessing, which continues to play a key role throughout the document (no written *ḥujja*s were presented at any stage of the hearing). The process of witnessing facilitates the bargaining process and mirrors the social networks in which the litigants were situated. Both witnesses were from the village of Barjā, where the properties were located, and were described as "mature and reasonable men" (*al-rajulayn al-'āqilayn wa'l-bālighayn*).

In Ḥanafism a financial claim (*dayn*) is looked upon as the "responsibility" (*dhimma*) of an individual who was given something on the basis that he will give its equivalent in return. In principle, therefore, any act of sale could be perceived as a debt on the part of the buyer: once a person buys something she is indebted to the seller. However, since the Ḥanafīs recognize only equal and simultaneous exchange, meaning that the exchanged commodities should be of equal value with a reasonable profit for the seller, the distinction between fungibles and non-fungibles is essential. In fact, only fungibles have a price (*thaman*) since they can be divided into their respective parts (currencies, weights, and measures), hence their exact assessment is possible thus eliminating the possibility of illegal gain or usury (*ribā*). Moreover, since "price is a confirmed debt at the responsibility [of the buyer] upon collation,"[48]

47. Rulings in cases of Shāfi'ī or Ḥanbalī judges had to be reconfirmed by a Ḥanafī colleague (Chapter 3 *supra,* most *marṣad* and sharecropping cases).

48. Ibn 'Ābidīn, *Radd,* 5:152: "*al-thaman mā yuthbat fi-l-dhimma dayn-an 'inda al-muqābala.*"

it is limited therefore to fungibles only, while non-fungibles are considered as immediately "owned by the buyer."[49] A commodity classified as non-fungible is therefore a sold object without price (*al-qīmmī mabī' lā thaman*).[50] The point here is that commodities which could be assessed in terms of their parts have a price and could be purchased; their value is a debt which incurs as the responsibility of the buyer. A contract of sale, one that involves fungible goods with a price, is therefore a process in which the buyer "possesses the debt (*tamlīk al-dayn*)."[51] In short, a sale is perceived as a debt which the buyer owns, while non-fungibles are not subject to this process of time-delay which the debt essentially assumes. A parallel thus exists between the sale/debt and the donation/gift since in both cases we are assuming a time-delay until a counter-gift is received, a process which the buyer (or receiver) is held responsible for as *dhimma.*

Even though the likes of Sanhūrī made the point that "obligation" per se does not apply to a contract of sale because exchange is supposed to be quasi-simultaneous, and hence only debt is an obligation,[52] a careful reading of the Ḥanafī texts might suggest otherwise. Of course, the problem here is that restrained use of *"obligation,"* a modern term which implies a "subjective right" (*droit subjectif, ḥaqq shakhṣī*), and which, used anachronistically might lead to confusion, in particular that the Ḥanafīs were under the general notion of a *ḥaqq 'aynī,* or "the right over the tangible object." Suffice it to say that a debt implies an obligation in the strong sense of the term precisely because of the delayed payment, hence its ubiquitous use as a procedural fiction.

In a way strangely similar to sixteenth-century English common law, debt has a double meaning. It refers at the same time to the amount due per se *and* the action that could ensue if the buyer-debtor was unable to refund his debt to the seller-creditor. In English common law, the debt is a "specific performance" in that it establishes the original "promise" of the contractual arrangement.[53] But the common law goes further and perceives a non-paid debt as a "breach of contract" that triggers an "action for damages," in which the payment of damages-interests is requested. Even though Ḥanafīs do not generally operate within any notion of damages and interests, the concept of debt, however, in its double meaning of value and action does exist. Since an act of sale is generally looked upon as a debt for the buyer, a non-payment or

49. Ibn 'Ābidīn, *Radd,* 5:135: "*al-qīmmī mamlūk-an li-l-mushtarī.*"

50. Ibn 'Ābidīn, *Radd,* 5:152.

51. Ibn 'Ābidīn, *Radd,* 5:152.

52. See Chapter 3 *supra.*

53. Jean-Claude Montanier and Geoffrey Samuel, *Le contrat en droit anglais* (Grenoble: Presses Universitaires de Grenoble, 1999), 15.

a delayed payment could trigger a legal action. For our purposes here, and in conjunction with the document under analysis, debt ends up devolving into several interrelated meanings: 1) It was primarily designed as a legal device to confirm a representative's identity and his right to represent as approved by his client; 2) it falls within the Ḥanafī notion of *māl-dayn,* in the sense that any legally purchased commodity is a debt for the buyer; 3) as non-payment it necessarily triggers a court action; and finally, 4) debt operates as a procedural fiction, which besides acting as a tool to consolidate a representative's identity, also entails an *obligation* towards the other party.

The meaning of fictitious debt, and its specific use in court documents, should therefore be conceptualized along the lines of legal anthropology. By breaking up sharī'a documents into bits of facts without focusing on the underlying cultural logic of a "document," traditional social history ignores such questions. A textual analysis seeks to reconstruct the logic of a document before extracting information and data from it, as follows: A purely empirical approach to sharī'a documents usually takes these documents at face-value and ignores the "symbolic" dimension of the "debt." But as I shall argue, it would be shortsighted to view the "debt" merely as a debt, that is, as a process of lending money and getting it back at the beginning of an inheritance case. One way of exploring such a problem is by assuming that the "debt" has a symbolic exchange value and hence takes the form of a "gift" (*don*) and "countergift."[54] To consider the document "textually-as a whole" means, in this particular case, to link the "debt" issue with that of the estate litigation and the ensuing settlement, and to consider the two issues as being related, rather than independent, as the document suggests. It is possible that the secret of the "debt" and that of the estate might clarify each other when taken relationally and dialectically. This brings us to the crucial issue of the "internal" logic of the "document." To what degree should this logic be trusted, and at what point should we go beyond its internal logic to apply the critical tools of social science and social history? In this case, we need to ask the question, "Why does the document-as-text hide what the 'debt' is all about?"

54. See Marcel Mauss, *The Gift* (New York and London: Norton, 1967); and, Maurice Godelier, *L'énigme du don* (Paris: Fayard, 1996), a lengthy commentary on Mauss' *Gift* from the perspective of a modern Marxist anthropology.

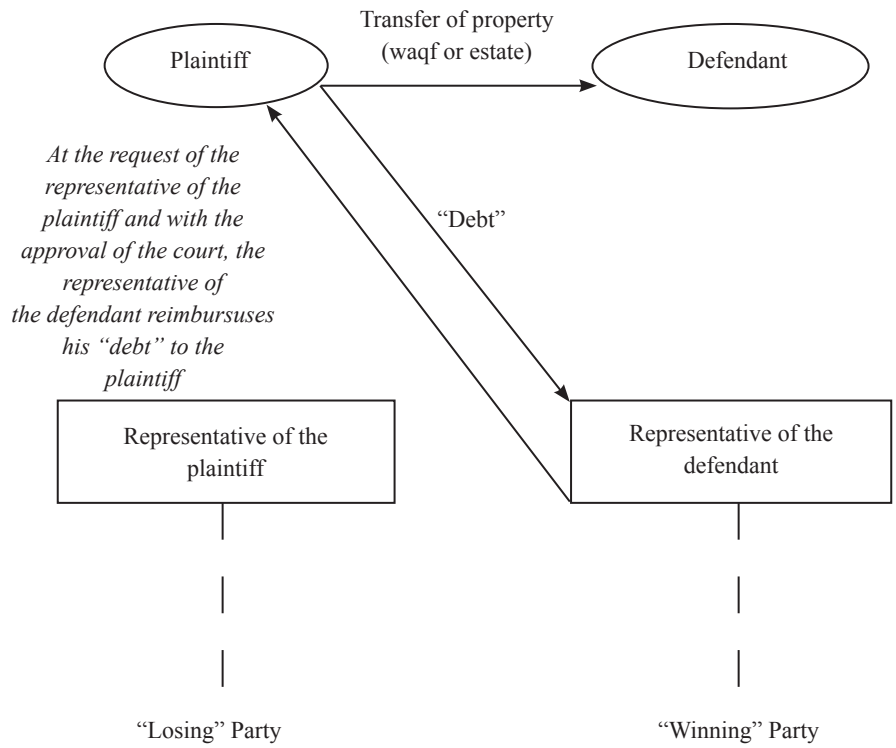
Transfer of property
(waqf or estate)
Plaintiff
Defendant
At the request of the representative of the plaintiff and with the approval of the court, the representative of the defendant reimbursuses his "debt" to the plaintiff
"Debt"
Representative of the plaintiff
Representative of the defendant
"Losing" Party
"Winning" Party

Figure 5-1. The debt (C 5-1).

Commentary: The "debt" is probably the most common procedural fiction, and hence comes with its own syntax, as it serves as a plug-in device in many type-contracts (C 3-3, 5-1 & 6-1). In effect, its purpose is general and would fit whenever there is a need to confirm the identity of the representative as plaintiff or defendant. Since those cases usually end up with transfers of property, the identity of the representative and his right to represent could become the *pièce-de-résistance* in the situation where the transfer is challenged in a future litigation. Beyond that, a debt entails an "obligation," while a regular act of sale does not, so that all those cases, despite their differences, are structured around an obligation to perform, meaning to transfer the (disputed) properties.

The "movement of debt" starts with the plaintiff's giving money to the representative of the defendant; after being summoned by the qāḍī, the representative of the defendant pays off his "debt" to the plaintiff. As noted, this procedure occurs frequently in inheritance and waqf cases. It is significant that in all such cases, the "movement of debt" invariably goes from the "loser" to the "winner" and back to the former (Figure 5-1). The "winner" gives the "loser" a small sum of money, so small that it looks insignificant compared to the total value of the estate. In order to explain this, I need to go beyond what the early stages of the document reveal to us. In this regard it is helpful

to assume that the inheritance case actually was a "friendly" litigation, that is to say, the two parties in "conflict" had settled their problems outside the courtroom and approached the qāḍī to make their new consensus public and official. If this assumption is accepted, the "debt" issue takes on a new light. The final movement of money from the winner-defendant to the loser-plaintiff may be a "symbolic" process in which the "winner" gives the "loser" what he owes him. But what is it that he owes him? Certainly, not fifty piasters. Rather, the "defendant" (in this case the mother of the "plaintiff") gives back to the plaintiff what she "owes" her by means of a symbolic gesture. In other words, the mother ("defendant") expresses gratitude to her daughter ("plaintiff") for coming to court and settling an outstanding property issue. Since it is the plaintiff who gives her property to the defendant (the mother), it is safe to assume, at this stage, that the reimbursement of the "debt" is a kind of giving-back. The logic here is that the party in whose favor the property has been settled (the defendant) compensates the other party by paying the "debt." (It is interesting that the payment is made by the defendant's legal representative rather than by the defendant herself.) Thus, the plaintiff is symbolically rewarded for giving away property and for agreeing to settle the "conflict" in court.

By relating the debt issue to the estate and its inheritance as a whole, the friendly-fictitious character of the conflict becomes even more apparent. Whereas the document suggests that we are dealing with two non-related issues, the debt and the conflict over the estate, the two issues are, in fact, inextricably related. The "debt" points to the transfer of the estate as an already-settled issue that requires only the official approval of the qāḍī, while the transfer of the estate gives the "debt" a symbolic significance that would have no meaning if it were considered separately and out of context.

Writing about gifts and bribes, Alan Smart observes, "The forms themselves are of great social importance, and retain their influence even when the content of a gift performance is little different from an attempt to bribe or to engage in an exchange of commodities where institutional constraints limit the market."[55] In other words, in societies that impose institutional constraints on the exchange of commodities, gifts and bribes are the form through which such exchanges take place. (Stated differently, gifts and bribes lower the transaction costs by bypassing institutional constraints, for example, state-imposed taxes and surtaxes.) The important point to remember here is that the form itself is of great importance because the social actors usually behave as if they were not exchanging (or reciprocating). In the case of Bashīr II,

55. Alan Smart, "Gifts, Bribes, and Guanxi: A Reconsideration of Bourdieu's Social Capital," *Cultural Anthropology,* 8 (1993), 388-408, quote on 404.

the "debt" form hides the transfer of property that occurred on a friendly basis. In my view, accepting the language of the court document at face value would be misleading. For one thing, "debt" does not explain the true nature of the process, that is, a concealed friendly litigation in which the "debt" is a "symbolic gift." Because the society of nineteenth-century Mount Lebanon imposed constraints on property transfers and inheritance, not to mention the ambiguous status of state properties in general, the sharīʿa courts provided the forms for an exchange of property that transcended the accepted rules—as in the case of a woman from outside the group inheriting the entire estate.

The inheritance

After the debt has been settled, the document enumerates and describes the twenty-five properties that constituted the physical aspect of the estate (see Table 5-1 *infra*). Let us keep in mind that the four men, Bashīr II and his three sons, Khalīl, Qāsim, and Amīn, were all dead at the time of the hearing, and that the two women, Saʿda and her mother, were fighting over the right to "own" the properties belonging to the estate.

According to the plaintiff, the twenty-five properties belonged to the three Emirs (I assume that the three men were "given" the properties from their father, although the document does not explicitly say this). Then, on 21 Rabīʿ II 1265 (March 16, 1849), Emir Amīn sold his half-sister Saʿda (the plaintiff) his entire one-third portion of the Karak mill (see *infra* Table 5-1, #1) for a "known price" (*bi-thaman qadruhu maʿlūm*) that eventually became (*istaqarra*) a "debt" (*dayn*) for which her brother did not request any reimbursement; the one-third of the Karak mill thus became her property. According to this account, one year prior to his death in 1850, Amīn "gave" his sister his full share of the Karak mill. This is why no price was reported for the transfer (Ḥanafī practice does not require specifying a value-assessment in a lawsuit "because an individual might not be aware of the value of his māl," and because "when the *ʿayn* is present [*ḥāḍira*], its value need not be mentioned except in theft litigations"[56]), and why the verb *bāʿa* ("he purchased") was used to denote a transfer/"gift" in the strong sense of the term (to give the act of "giving" from Amīn to his sister more weight in the court), whereas a true act of buying and selling, like the thousands that populate court records (C 3-2), would have involved an exchange for a specific sum (or its equivalent). Unlike his two brothers and sister, Amīn apparently had no children; thus it is plausible that he decided to "give" his own share to his sister Saʿda rather than

56. Ibn ʿĀbidīn, *Radd,* 5:545.

to his brothers' sons and daughters. (I am trying to make the arguments of the plaintiff sound coherent by presupposing that there is an element of truth in them.)

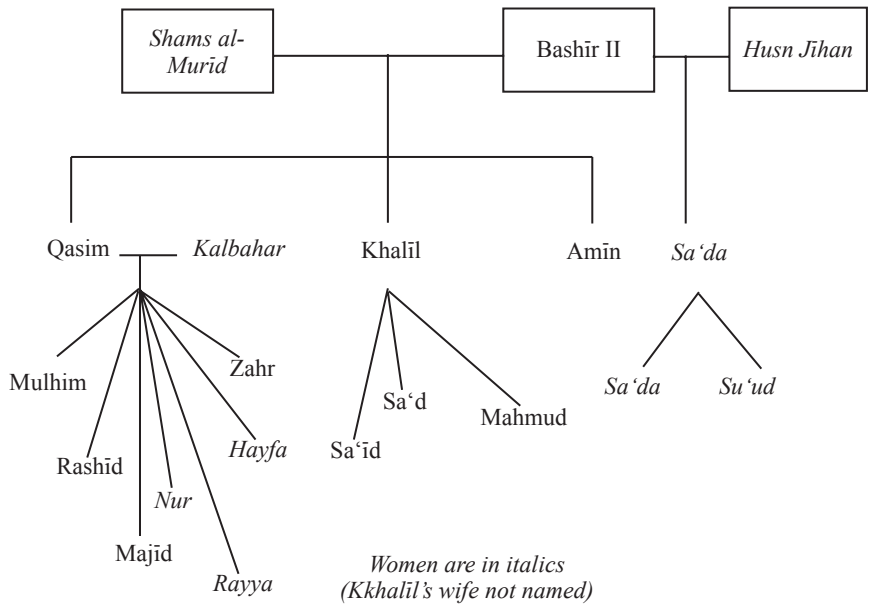

Figure 5-2. Heirs of Bashīr II (C 5-1).

Commentary: Since the Shihābs intermarried almost exclusively among cousins (and that was apparently the case of Bashīr II's ex-wife, Shams al-Murīd), Ḥusn Jīhān, who was an ex-Circassian slave, and her two daughters, Sa'da and Su'ūd, were the only "outside" elements in this genealogical chart. Yet, their role in both this case (C 5-1) and the following one (C 5-2) will turn out to be crucial as the bulk of Bashīr II's estate will fall in their hands. Considering that the Maronites took great care not to let unmarried women or widows inherit, one can only speculate as to why Ḥusn Jīhān was so fortunate: it could either have been a moment of reshuffling properties within the family, or else women were a "safer" situation for a political family like the Shihābs, especially during their demise period.

Bashīr II's sons, Qāsim and Khalīl, both pre-deceased their father. When the oldest son, Qāsim, died in 1846, his one-third portion of the mill was inherited by his wife, three sons, four daughters, and father, Bashīr II (who received one-sixth of one-third).[57] When the middle son, Khalīl, died in 1850,

57. The plaintiff, Sa'da, Qāsim's half-sister, did not inherit anything at this stage because the two were from different mothers. Similarly, Ḥusn Jīhān, since she was not Qāsim's mother, has no share in the inheritance.

his one-third portion of the mill was inherited by his three sons and his father (Bashīr now received a second one-sixth of one-third, giving him a total of one-ninth of the mill, or, in the language of the document, "three minus one-third qīrāṭs"). When Bashīr II died, at a time when he was already predeceased by his three sons, he left his part of the estate which was one-sixth of the two-thirds, to his wife, Ḥusn Jīhān, their daughter, Sa'da, and her two daughters; and to two of Qāsim's sons, Milḥim and Rashīd,[58] and finally, to Khalīl's three sons.

These details are of interest to us only from the point of view of the plaintiff, Sa'da, the daughter of Bashīr II. By the time of the hearing in September 1857, the four males had died and she had inherited from them an amount equivalent to "nine minus one-third of one-third qīrāṭs." (The logic of the calculation is not specified in the document.) One possibility is that Sa'da already had eight qīrāṭs from Amīn, and after the death of her father and brothers, the remaining two-thirds were divided among all the male and female heirs, with males receiving twice share of females. In all these calculations, the court applies the Ḥanafī rules of inheritance even though dealing with a Maronite estate.

Although Sa'da (the plaintiff) had inherited these properties, the properties themselves were in the possession of her mother (the defendant), and it was for this reason, ostensibly, that Sa'da took her case to the qāḍī. Our document contains the following "summary" of the argument put forward by Sa'da's representative.[59]

> Ḥusn Jīhān, the mother of my client, is the one who now "controls" [*wāḍi'at al-yad*] all these properties through usurpation [*bi-ṭarīq al-ghaṣb*],[60] without

58. It is not clear why only two of Qāsim's seven children should inherit.

59. In the two quotes that follow, the two parties are only nominally directly addressing each other. In fact, as I have argued in my introductory remarks, I consider it misleading to analyze this document in terms of a single "author" or even of several "speeches" brought together under one narrative (the qāḍī, the plaintiff, and the defendant). Because we have no access to the complete hearings, both the plaintiff's and defendant's "voices" are silenced in the qāḍī's draft which, in turn, is part of an anonymous "we."

60. The *ghaṣb* is a legal concept in Islamic law, and implies "taking by force" (or more accurately, "putting one's hand on," *waḍ' yad*) inert or non-inert things, properties which are transferable or non-transferable (*manqūl wa ghayr manqūl*), the latter category including also cash sums as well as human beings, in particular women who could be "forced" into "illicit sex." The category of *ghaṣb* is thus very broad, and, in case a defendant was proved guilty of a *ghaṣb* act, the next step would typically be the assessment of damages together with an attempt on the part of the court to "put an end to the action of the perpetrator(s)" (*daf' al-ṣā'il*). This is of course done with the intention of "refunding" the person (usually the plaintiff) against whom an illegal act (or crime) has been committed (*al-maṣūl 'alayhī*). In the case of Bashīr II, the defendant was acquitted from the court for any act of wrongdoing, in particular anything related to *ghaṣb.* Furthermore, as I have argued at length in the previous section, we are faced here with a friendly-fictitious litigation which makes labeling the case under the usual *ghaṣb/daf'* strategies quite misleading. For a formulation of these concepts and their implications in a modern context, see Wehbeh al-Zuḥaylī, *al-Fiqh al-islāmī wa-adillatuhu* (Damascus: Dār al-Fikr, 1984), 5:705-90.

> any justification in the Sacred Law [*bi-dūn wajh shar'ī*]. I therefore request [that the court] removes these properties from her possession [*raf' yadiha 'an hādhihi al-amlāk*] except for those she owns legally from her husband, Emir Bashīr, equivalent to one-third of a qīrāṭ out of the twenty-four [*qīrāṭ*s]. What remains after that belongs to my mandator, and the other heirs shall be treated accordingly, and each one of them may dispose of his share as private property [*yataṣarrafu kullun bi-naṣībihi 'an ṭarīq al-milk*].[61]

To this, the representative of Ḥusn Jīhān (the defendant) replied:

> None of the properties whose boundaries are defined above were ever the properties of the three Emirs, the sons of Bashīr II. Rather, they were completely the property [*milk*] of my client, who had purchased them legally for the known sum of 236,000 piasters from her husband Emir Bashīr. ... Prior to the year 1265 [1848], which is the year that Sa'da had claimed was the one in which the transfer of properties occurred, the three Emirs had acknowledged voluntarily [*aqarra wa i'tarafa*] that these properties belonged to their father, Emir Bashīr.

Sa'da's representative categorically denied these allegations and demanded that they be substantiated, prompting Ḥusn Jīhān's representative to summon two witnesses who had been close to Emir Bashīr II, both of whom attested (again, swearing "by the exalted God") that the Emir had sold all the properties to his wife for the known sum of 236,000 piasters prior to the year 1265/1848, as acknowledged by the Emir's three sons. (At this stage, the document reiterates the names of the twenty-five properties but substitutes "the property of Ḥusn Jīhān" for the earlier designation, "the property of the three Emirs.")

In his decision, the qāḍī accepted the statements of the two witnesses as "true," thus making the defendant, Ḥusn Jīhān, the owner of the twenty-five listed properties.

> The testimony of the two witnesses has been legally accepted [*al-qubūl al-shar'ī*], and it has thus become evident to the qāḍī that the three Emirs, Qāsim, Khalīl, and Amīn had acknowledged that these properties belonged to their father and that they did not own any of them, nor did they have any semblance of property [*shubhat milk*].[62] This makes unacceptable the complaint of Lady

61. This citation and the ones that follow are from the court document described in note 1.

62. The concept of *shubhat milk* related originally to the notion of "illicit sex" (*zinā*). The latter is defined as sexual intercourse (*waṭ'*) between a man and a woman from the front (*fi'l-qubl*), without any prior contract (*'aqd*) between the two parties involving property (*milk*) or the semblance of property (*shubhat milk*). Whenever there is any uncertainty (*shubha*) regarding ownership of a slave with whom a man had sexual intercourse, the *ḥadd*-punishment for *zinā* is avoided. Such uncertainty occurs, for example, when a man has intercourse with his son's slave, since, according to a well-known *ḥadīth*, "You and your money [possessions] belong to your father". By extension, the notion of *shubha* came to refer to any object or thing (including slaves) which might appear to belong to a certain person when *de jure* it does not. In our case the

> Sa'da because [the possession of the property by her father] was prior to the date in which she claimed buying [the one-third] from her brother Amīn. The qāḍī has therefore decreed legal the fact that Ḥusn Jīhān bought the above mentioned properties from her husband, Emir Bashīr II, for the known sum [of 236,000 piasters], and that the plaintiff and her representative should be forbidden [*man'*] from any act of buying or inheriting [of the properties mentioned].[63]

Analysis and syntax

Let us now examine the logic of the judicial arguments relating to the inheritance dispute and the manner in which they were drafted for this particular document. The main steps and "turns" of this argument are as follow:

1. The case was initiated by the representative of the plaintiff, Sa'da. Through her representative, Sa'da claimed that the twenty-five properties in question originally belonged to the three Emirs, the sons of Bashīr II, as confirmed by the initial listing of the properties.

2. The representative added that shortly before the death of her brother, Amīn, in 1265/1849, Sa'da "purchased" from Amīn his one-third share of the properties. No price was specified because the transaction was considered a "gift" from the brother to his sister. Sa'da subsequently inherited a small share belonging to her father which he had inherited from two of his sons who predeceased him. For this reason, Sa'da's share was slightly greater than one-third.

3. Sa'da's representative sought to recover "possession" of his client's share from her mother, who controlled the totality of the estate and its revenues. (Note that when the plaintiff's representative made her case, no testimonial evidence was requested by the qāḍī; the plaintiff's inability to provide witnesses would

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qaḍī declared that the emir's three sons not only never possessed the estate as *milk* but also that there was no *shubhat milk*, that is, they never enjoyed the right of *shubha* (uncertainty or semblance). In the arguments that led to the final judgement, the notion of *shubhat milk* was less important than the testimonies of the two witnesses provided by the defense, which the qāḍī accepted as valid. See Wehbeh al-Zuḥaylī, *al-Fiqh al-islāmī wa-adillatuhu* (Damascus: Dār al-Fikr, 1984), 6:23-30.

63. As is common in the Ottoman court system, qāḍīs typically do not refer to the judicial texts (the "statutes") and "opinions" (*fatāwā* and the like) that made their final decision-making possible. It remains the task of the social scientist to reconstruct the rationale behind the way in which the various arguments come together in the narrative of the document-as-text. As this case shows, reference to the classical judicial texts is only one step in the process. The strategies of the social actors need to be contextualized in a social and historical perspective.

have created a presumption in favor of the defense and would have been noted in the proceedings).[64]

4. Through her representative, Sa'da's mother, Ḥusn Jīhān (the defendant) denied the claim. In her view, the entire estate, within the limits and boundaries accepted by the court, belonged to her as a result of her having purchased these properties from her husband, Bashīr II, prior to 1265/1849, for the sum of 236,000 piasters, with the full knowledge of their three sons.

5. The plaintiff's representative demanded that his colleague substantiate his arguments; the latter brought two witnesses to court.

6. The witnesses' statements fully corroborated the defendant's claim, and a new list of properties was added to the proceedings in which "the property of the three Emirs" replaced the "property of Ḥusn Jīhān".

7. The qāḍī considered the witnesses' acknowledgement (sworn "by the Exalted God") to be sufficient grounds to award the defendant her full rights over her properties, and he declared the case to be settled.

In the set of arguments and steps given to "substantiate" the defendant's claim to the properties, the testimony of the two witnesses in favor of the defense was sufficient and decisive, obviating any need to swear an oath. The plaintiff did not provide any witnesses (it is not certain whether she was summoned to do so) and she was not required to swear to the truth of her statements, as represented by her agent (she was not present in the courtroom).[65]

One more issue needs to be clarified: the fact that no document relating to the twenty-five properties purchased by the defendant for the sum of 236,000 piasters was produced in court. In the Ottoman Syrian provinces, qāḍīs routinely accepted written contracts, known as *ḥujja*s, as a form of

64. It is well-known that under classical Ḥanafite law, the plaintiff does not, normally, take the oath, nor do witnesses for that matter, except under exceptional circumstances. Ḥanafī practice thus leaves the bulk of the proof on the defendant's side. Despite the fact that these are well-known and accepted procedures, studies on the practice of the Ottoman courts (and for later periods as well), should not take them for granted, and instead question how for each particular case, taking or not taking an oath, presenting witnesses, or written documents (or the lack thereof), are usually used as strategies in order to present to the court the set of "proofs" required by the law.

65. As Schacht noted, "the 'witnesses' were concerned not so much with giving evidence as with affirming by oath the truth of the claims of their party, as compurgators." See Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 188. Even though Schacht is referring here to a practice which dates from the first half of the second century (A.H.), and which, according to him, has been "superseded," I still think that his description of the role of the witnesses as "compurgators" describes best the *telos* of witnessing in the Ottoman period. In fact, our witnesses, beyond the fact of being "known," "respectable," and "adult," did not provide the court with anything different from what the defendant wanted them to say. They were also not subject to cross-examination and the like. In other words, the value of their testimony rested solely on their *own* value as "respectable" individuals, and on the fact that there was someone to testify in favor of the defendant.

evidence.[66] The absence of any such ḥujja for a large estate belonging to the most important political family in Mount Lebanon, even though the Ḥanafīs did not require that such contracts be solely confirmed in writing, raises several questions: Could Bashīr II and, later, his wife have acquired such a large estate without there being any written record of the transaction? If so, was this a common practice in Mount Lebanon or was this particular case, which involved a prestigious political family, perhaps exceptional? If written documents did exist, why were they not presented in court, where they would have provided the qāḍī with "hard" (systematic) evidence?

We are faced with three—related?—issues in need of an explanation: the "debt"; the plaintiff who was unable to support her arguments (and provide witnesses); and finally, the absence of any written documents. As noted above, in order to understand the logic of the "document" as a whole, it is helpful to consider the various arguments relationally and to examine the possibility that there was no "real" conflict, but rather that this may have been a "constructed (friendly) litigation." Having come to court without any witnesses or documents, the plaintiff was ipso facto confronted with defeat from the outset. Under "normal" conditions, one would expect this kind of "plaintiff" to be the "defendant." Why should someone file a property suit against her own mother without any evidence to support her allegations?

My response to this question is that the debt-procedure points to the friendly-fictitious character of the "conflict": The "debt" was nothing but a "sign of recognition" for a "service" that the daughter (plaintiff) had performed for her mother (defendant); the mother then, in a final gesture, gives-back the "debt." The "friendly" character of the "conflict" explains, in part, why the defense came to the hearing armed with better evidentiary resources. In other cases examined later (C 6-1) that appear to have been friendly-fictitious litigations, the party that eventually "wins" is always placed in the position of the defense, perhaps in order to make the arguments of the defense appear more plausible. Finally, I assume that any documents relating to the twenty-five properties were withheld to facilitate the redistribution of the properties. Reliance on

66. Schacht noted in *Origins,* 188, that even though the Qur'ān (ii:282) explicitly endorses the practice of putting contracts into writing, the alternative practice of restricting legal proof to the evidence of witnesses goes back to the first century A.H., and the reasons behind this shift are not well-known. In the Ottoman period, written documents (*ḥujja*s) were routinely accepted in the Sharī'a courts, but so were the testimonies of witnesses in case no written documents were available. It thus seems that both methods were alternatively used and both were accepted as legitimate legal evidence. Since in Ottoman courts both procedures were equally valid, it is obvious that when no written documents were presented, this could have either meant (1) that no written document(s) existed in the first place; or (2) that a written document did exist, but not showing it publicly in court turns out to be a more profitable enterprise. In both cases, absence of written documents was a means to liberate oneself from the tyranny of the written.

witnesses and "oral" testimony may have weakened whatever constraints would have been created by the presentation of "written" documents, thereby allowing Ḥusn Jīhān and Sa'da to achieve their collective goal, that is, to effect a redistribution of Bashīr II's estate six years after his death and to identify the estate with the name of Ḥusn Jīhān.

The importance of this case stems from the fact that it contains two distinct procedures common to many fictitious litigations: first, the debt, and then the *waḍ' yad* ("occupation") and its corollary the *raf' yad* (removal of the unlawful usurpation and occupation). The two steps need not be in reality related or even tied together in a single case. In fact, the two procedures could be each described as an autonomous "plug-in" in the sense that they could be plugged into cases involving procedural fictions, but of a different nature. In our first case here, the necessity of the debt-procedure is dictated by the second part, which is the heart of the case and in which claims of unlawful occupation by the defendant are put forward. In fact, the sole purpose of the debt-procedure was to confirm a representative's identity and would have been useless without the substance of the case, namely the second procedural step on unlawful occupation. Thus, had the defendant Ḥusn Jīhān bypassed representation altogether and appealed her case on her own, the debt-procedure would have been superfluous. This is why the debt-procedure is plugged into a great variety of cases such as unlawful occupation-cum-property-transfers (C 5-1), waqfs (C 6-1), and tenancy contracts (C 3-3). In short, the debt-procedure cannot possibly exist on its own—that would be absurd—and needs to be connected to another procedure to become meaningful. This is why its full meaning is only revealed once the case is fully analyzed and the order of reading is reversed (the debt-procedure becomes meaningful only towards the end). To be sure, the debt-procedure receives its meaning from the anthropology of Ḥanafī practice, and primarily its notion of *māl-dayn.*

By contrast, unlawful occupation and its corollary, the transfer of property that follows, based on the judge's final ruling, are part of a single autonomous procedure and form the heart of a case. As already discussed in the previous chapter on rent and taxes,[67] Ḥanafī practice accepts that the "occupation" of a land "for a period of time," while working on it and cultivating it, is a definite indication of "possession" if not full ownership (*milk*), in spite of the rights that previous landowners might have claimed over the same property. To be sure, such a flexibility was dictated by the ambiguous status of the majority of rural lands: either state-owned (*mīrī*), or waqfs, or *mawāt,* with only a tiny minority of absolute ownership (*milk*). The notion of *waḍ' yad* ("occupation")

67. See Chapter 4 *supra.*

hence became essential in establishing both rights of "possession (*taṣarruf*)" and "ownership (*milk*)." Such rights, however, could be established and confirmed in a judge's ruling while focusing solely on the *present* status of the disputed property, and bypassing its past ownership(s) altogether: hence the primacy of oral testimonies over written documents, even if already approved and sealed by judges. To confirm an ownership right, therefore, the litigation could be either real or fictitious, depending on how the disputants are related to one another. In a fictitious litigation, such as the one we have examined, the person who will receive the full ownership rights will typically assume the role of defendant. A plaintiff will then accuse her of unlawful usurpation (*ghaṣb*) and occupation and request a removal of this illegal state. The plaintiff, however, will be short of evidence (even the exact date of the *ghaṣb* is unnecessary),[68] and it will be the defendant's burden to furnish evidence. To be sure, such a flexibility enabled not only friendly property transfers rather flawlessly, but even more important, it permitted a change of status for the disputed properties. Thus, in the case of the estate of Bashīr II, besides the fact that the defendant Ḥusn Jīhān received her ownership rights, the status of all the properties were de facto confirmed as milk, even though no legal evidence of *past* ownership was ever established (Ḥanafī practice does not request such evidence). To conclude, the law focuses on the present, on the actual occupation of the land and the labor invested in it rather than on the genealogy of its past ownership.

The outside

The estate ended up in the hands of Ḥusn Jīhān, who was situated outside the Shihābī lineage. Considering the size of the estate, the transfer was executed in court with remarkable ease and simplicity. (Since no studies of a similar nature have been done on the status of property in Ottoman Mount Lebanon,[69] it is impossible at this stage to say how common it was for in-marrying women to acquire ownership of their husbands' estates.) The plaintiff and the defense presented the court with two lines of argument, one that would have kept the estate within the Shihābī patriline, in which case it would have been divided,

68. Ibn ʿĀbidīn, *Radd,* 5:547: "If a person claims that this property is mine as *milk* and it is illegally in your hand [*fī yadi-ka*], the claim is valid even if the exact day of the *ghaṣb* is unspecified."

69. With the notable exception of ʿAbdullah Ibrāhīm Saʿīd, *Ashkāl al-milkiyya wa anwāʿ al-arāḍī fi Mutaṣarrifiyyat Jabal Lubnān wa Sahlu-l-Biqāʿ, 1861-1914* (Beirut: Maktabat Bīsān, 1995), but which is mostly limited to the *mutaṣarrifiyya* period.

according to the sharī'a rules, among a large number of male and female heirs; and another that would have given a single woman from outside the Shihābs a monopoly over the estate. That the second alternative was adopted is surprising in a society in which endogamy was privileged as a means of protecting wealth from "outsiders." From the perspective of court procedures, however, the case is not unusual and does not point to any novel or a hard decision-making.

In the absence of a full documentation, I can only speculate as to why this happened. First, neither of the litigants was a male Shihābī.[70] Second, both shared a common interest in keeping the estate from Bashīr II's agnatic grandchildren. Third, the case turned on the demonstration that the properties did not belong to the three Shihābī Emirs, a point that was made by bringing to court two male witnesses described as "reliable" and "reasonable." It is possible that the daughter played the role of a plaintiff precisely in order to provide the court with an alternative line of argument, one that would oppose to the claims of the defendant. Such a technique was used frequently in the courts in order to eliminate possible counter-arguments and the like. Finally, it should be noted that although the litigation between the daughter and her mother may have been "friendly," one cannot say the same about the relationship between the two litigants, on the one hand, and the rest of the descendants of Bashīr II, on the other. The latter emerged from the litigation empty-handed.[71]

70. For politically troubled families, transferring properties to women could indicate a legal device to avoid confiscation.

71. My assumption, throughout this case study, is that the sale of the estate from Bashīr II to his wife has been fabricated by the two parties. Actually, the plaintiff's version on the status of the estate seems more plausible and "realistic" to me.

Table 5-1
Estate of Bashīr II (C 5-1)

Commentary: Sharī'a court cases dealing with inheritance and waqf commonly include detailed descriptions of the properties subject to litigation. It must be recognized, however, that such descriptions were not drawn up according to modern topographical methods (which were not implemented until the period of the French Mandate). Rather, a property was located in relation to other properties and/or locations surrounding it (north, south, east, and west). The following table, entitled "Estate of Bashīr II," contains a line-by-line tabulation of that section of the document that describes the twenty-five properties, including their names, locations, and descriptions, in the order in which they are listed in the document.

In addition to giving a clear picture of the physical aspect of the inheritance and waqf, the table serves as a tool for understanding aspects of property in Mount Lebanon under Ottoman rule. Before using this table for "statistical" purposes, however, the following problems should be kept in mind: First, many of the properties listed under the four cardinal points (north, south, east and west) are mentioned more than once because any one property may be contiguous to several other properties. Second, it would be difficult to locate these properties on a map, because many of them are not contiguous to each other and are located in different regions. The following remarks should be treated as a tentative picture of the types of property common in Ottoman Mount Lebanon.

The estate of Bashīr II consisted of a mill and an olive press (#1, #2) in addition to twenty-three landed properties (*basātīn*) annexed to the latter. The landed properties, at first owned exclusively by Bashīr II, and later purchased by his wife Ḥusn Jīhān for a "known sum," were all rented to métayers, sharecroppers, and tenant-farmers. The exact nature of the contract between the landlord and the various categories of peasant is not clear since we have only the vague phrase *bi-mu'āmalat fulān,* roughly "worked by so-and-so." The list of the "possessors" of properties #3-25 is strikingly different from the list of proprietors mentioned the last four columns of the Table. With only one exception (#4 and #6 were "possessed" by one person, Ayyūb Ḥjej), properties #3-25 had different names and families attached to them, probably a sign that we are dealing here with "small" peasants-tenants without much capital. On the other hand, all the properties listed in the last four columns are almost exclusively divided between the House of the Shihābs and that of the Murāds. Thus thirty-one of those properties belong to Ḥusn Jīhān, twelve are listed as the "property of the Emirs, Aḥmad, Ḥaydar and Sa'd ad-Dīn, sons of Emir Manṣūr Murād," and eleven belong to the waqf of the Prophet Nūḥ. Among the remaining properties, some names overlap with the "tenant-farmers" in the second column ("Property") in which the basātīn are listed. Overall, the individual and family names mentioned in column 2 ("Property"), on the one hand, and columns 3-6 ("North," South," "East," and "West"), on the other, are strikingly different, suggesting a distinct pattern of landholding in this part of the Biqā' valley. The ownership of the land as milk belonged to the big *muqāṭa'jī* families like the Shihābs and Murāds who not only were granted large *muqāṭa'a*s and were the tax-farmers of the state, but also owned large "private properties" as *milk.* On the other hand, small and medium "tenant-farmers" used to "rent" the land from these large family proprietors.

Such details may constitute important elements of a genuine social history of Ottoman Lebanon that would complement the "textual" analysis relied upon here to analyze this document. After several decades of political supremacy and stability, the political fortunes of the Shihābs declined dramatically in the 1850s and 1860s. Seen in this light, this document may bear witness to an attempt by members of a younger generation to gain control over large estates that had belonged to elders of a previous generation.

Estate of Bashīr II (C 5-1)

#	Property	North	South	East	West
1	Mill (*maṭḥana*) of Karak in Birjā (the Biqāʿ Valley, part of the Province of Damascus), property of Ḥusn Jīhān, wife of Bashīr II.[72]	Property of Emir Saʿīd, son of Emir Bashīr Murād.		Water Canal.	Water Canal.
2	Press (*maʿṣara*) of ʿAyn al-Ḥajar, same location as #1, contains four threshing-floors (*bayādir*) and six wells; property of Ḥusn Jīhān.	Property of Anṭūn Abū Yaqẓān.	Property of Ḥusn Jīhān.	Property of the three brothers, ʿAbdallāh, Bishāra and Anṭūn, sons of Ḥannā Ghurra.	Property of Ḥājj Ayyūb.
3	Bustān ("garden")[73] of ʿAlī Nāṣir in the village of al-Muʿallaqa near Zaḥleh, now "worked by" (*bi-muʿāmalat*)[74] Murād Ṣūmā.	Public Road.	Public Road.	Property of Emirs, ʿAbdallāh, Murād, Dāwūd, and Ibrāhīm, sons of Emir Shadīd Murād.	Public Road.

Table 5-1: 1/5

72. During the first phase of the hearing, when Saʿda's case was being presented by her representative, the twenty-five properties listed here were identified as "the property of the three Emirs, Qāsim, Khalīl and Amīn, sons of Bashīr II." It was only during the second stage of the hearing that the properties were re-designated as "the property of Ḥusn Jīhān." Since the qāḍī held in favor of Ḥusn Jīhān, the wife of Bashīr II, I have kept the properties as they were listed during the second stage of the hearing.

73. All the landed properties (*basātīn*) listed below (#3 to 25) were part of and annexed to the mill and press.

74. Since all these landed properties belonged to Ḥusn Jīhān, the term "worked by" (*bi-muʿāmalat*), should not be considered as a right of "full possession," i.e., "property" (*milk*), but only as the right of using the land for a limited amount of time. It is not clear what type of contract was involved between the owner, Ḥusn Jīhān, and her "tenants."

#	Property	North	South	East	West
4	Bustān of ʿAlī Nāṣir (same location as #3), "worked by" Ayyūb Ḥjej.	Public Road.	Property of Emir Saʿīd, son of Emir Bashīr Murād, and of the two Emirs Yūsuf and Maḥmūd, sons of the Emir ʿAlī Murād.	Property of Emirs Salmān and Mūsa, sons of the Emir Naṣr Murād.	Property of the Emirs, sons of the Emir Shadīd Murād.
5	Bustān of al-Sayyid ʿAlī now "worked by" Ṭannūs, Ibrāhīm, and Yūsuf, sons of Naṣr Abī Sharaf.	Property of Ḥusn Jīhān.	Property of the Emirs Aḥmad, Ḥaydar and Saʿd ad-Dīn, sons of the Emir Manṣūr Murād.	Water Canal.	Public Road.
6	Bustān now "worked by" Ayyūb Ḥjej.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Water Canal.	Public Road.
7	Bustān now "worked by" Ḥamza and Aḥmad Zurayq.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Forested land (*mashjara*), property of Maḥfūẓ, Mikhāyil, Mūsa, Masʿūd and Ibrāhīm, sons of Yūsuf al-Khūrī b. Mitrī Maqṣūd.	Public Road.
8	Bustān now "worked by" Jirjis, Ḥannā and ʿId, sons of Saʿd Jāmūs.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Mashjara, same as #7.	
9	Bustān now "worked by" ʿAbdul Aḥad b. Mikhāyil ʿId and Mūsa b. Shadīd Abū Dāghir al-Khajūl.	Property of Murād b. Ḥaydar.	Property of Ḥusn Jīhān.	Property of the sons of Yūsuf al-Khūrī (#7).	Public Road.

Table 5-1: 2/5

#	Property	North	South	East	West
10	Bustān now "worked by" ʿAlī b. Ḥusayn al-Ḥūt.	Public Road.	Property of Ḥusn Jīhān.	Waqf landed property, part of the awqāf of the Prophet Nūḥ, under the administration (*naẓẓāra*) of Salīm b. ʿAlī al-Murtaḍā.	Public Road.
11	Bustān now "worked by" Yūsuf b. Ilyās ʿId.	Property of Ḥusn Jīhān.	Public Road.	Property of Ḥusn Jīhān.	Public Road.
12	Bustān now "worked by" Murād b. Ḥaydar al-Zayn.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Public Road.
13	Bustān now "worked by" Ilyās and Unṭāniyus, sons of Buṭrus Shaʿnīn.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Property (*ʿaqār*) of the Emirs, sons of Emir Manṣūr Murād; and the waqf of the Prophet Nūḥ (see #10).
14	Bustān now "worked by" Jirjis, Ḥātim, Ilyās and Fāris, sons of Ṣaʿb Ḥātim.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Property of the Emirs, sons of Emir Manṣūr; and the waqf (#10).	Old Coffer-dam (*sikr mā'*).
15	Bustān now "worked by" Ḥasan Ḥusayn Shams.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Property of the Emirs, sons of Emir Manṣūr; and the waqf (#10).	Property of ʿAbdallāh Ghurra.
16	Bustān now "worked by" Yūsuf and Ẓāhir, sons of Ḥasan Zurayq.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Property of the Emirs, sons of Emir Manṣūr; and the waqf (#10).	Old Coffer-dam.

Table 5-1: 3/5

#	Property	North	South	East	West
17	Bustān now "worked by" Ilyās and Jirjis, sons of Zu'ayyit.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Same as above (#16).	Old Coffer-dam.
18	Bustān now "worked by" Ḥannā b. Jirjis al-Kaḥtūnī.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Same as above.	Old Coffer-dam.
19	Bustān now "worked by" 'Aql Abū Jitq and his sons, Ḥannā and Ilyās.	Property of Ḥusn Jīhān.	Property of Ḥusn Jīhān.	Marsh (*ghayḍ*)[75] of Ayyūb Ḥjeij b. Sāsīn Khaṭar, Mūsa al-'Akkūzī, Qāsim b. Ḥammūd Zayn al-Dīn, Yūsuf b. Ḥasan Zurayq, and Mir'ī b. Ḥasan al-Ṣalūkh.	Old Coffer-dam.
20	Bustān now "worked by" Faraḥ b. Ilyās Qmayḥ.	Property of the Emirs, sons of Emir Manṣūr Murād; and the waqf (#10).	Property of Ḥusn Jīhān.	Forested lands (*mashājīr*), each one "in the hand of" (*bi-yad*) Ayyūb Ḥjeij, Ḥammūd b. al-Ju'feir, 'Alī Qurayyiṣ, and Ḥannā b. Nu'mah Ḥjeij.	Old Coffer-dam.
21	Bustān now "worked by" Faraḥ, Yūsuf, Jirjis and Ibrāhīm, sons of Ilyās Faraḥ.	Public Road.	Property of the Emirs, sons of the Emir Manṣūr Murād; and the waqf (#10).	Property of Ibrāhīm b. Yūsuf Ḥjeij, and facing it the property of Yūsuf b. Ilyās Qmayḥ.	Property of the Emirs sons of Emir Manṣūr Murād; and the waqf (#10).

Table 5-1: 4/5

75. The term "marsh" is roughly the equivalent of the Arabic *ghayḍa*; I assume that *ghayḍ*, otherwise meaningless, signifies "marsh."

#	Property	North	South	East	West
22	Bustān known as al-Baṣal, now "worked by" Ayyūb Ḥjeij.	Property of the Emirs, sons of Emir Manṣūr Murād; and the waqf (#10).	Public Road.	Property of the Emirs, sons of Emir Manṣūr Murād; and the waqf (#10).	Property of Ḥusn Jīhān.
23	Bustān now "worked by" Ḥasan Nujayba and Ḥasan the son of his brother Ḥammūd.	Waqf for the poor of the convent of the Rūm.	Public Road.	Public Road.	Public Road.
24	Bustān now "worked by" Qāsim and Ḥasan b. Wehbeh.	Property of the Emirs, sons of the Emir Shadīd Murād.	Property of Wākīm b. Ḍāhir Ḥjeij.	Public Road.	Property of Sam'ān al-Zayn.
25	2/3 of the "square" (*sāḥa*) located in the same village of Barjā, that contains shops (*dakākīn*), some in good condition (*'āmira*), others not (*muraddama*), and whose locations are all well known because located in well known spots; in addition to the "house" (*dār*) known as the Shūnah and located in the same village. [The remaining one-third is for the Emirs of the house (*bayt*) of Murād]	Property of Mūsa al-Ṣāyegh.	Coffer-dam.	Coffer-dam.	Property of the "House" of the Ḥaddāds.

Table 5-1: 5/5

Two litigations into one single case

While examining the case of the inheritance of Bashīr II, I argued that many such court documents, which, to be sure, were not limited to land-transfers, but also involved waqfs (C 6-1) and tenancy contracts (C 3-3), and also, as we shall see later, torts and crimes (Chapter 11), cannot be properly understood unless we analyze the dynamics of their litigation and determine first whether it was genuine or fictitious. I then posed that the Bashīr II case was indeed fictitious on the basis that, 1) the alleged litigation begins with a debt-procedure whose sole purpose was to confirm the identity of the defendant's representative; and 2) when the plaintiff accuses her mother of unlawful usurpation over a set of disputed properties, she "loses" her case on the ground that she was short of evidence. The set of properties were therefore to be transferred to the mother-defendant after two witnesses corroborated her claims. Indeed, it does seem a bit strange for a plaintiff to take action in court, while short of substantial evidence, only to lose her case—and all her alleged set of twenty-five properties! Despite the strange nature of such cases, which populate the Ottoman *sijill*s by the hundreds, and whose reading is not as straightforward as it might first seem, academics prefer to opt for the "safest" route and read documents literally, an approach that would have dazzled judges trained in the tradition of the now defunct Majalla and familiar with Ottoman law. Judges and lawyers, however, instinctually know the procedures behind fictitious litigations, and are thus able to spot them directly, but the downside is that they rely so much on hindsight that the meaning of it all escapes them. Indeed, explaining how such procedures work and why they prove to be essential to the system is what really matters. At times, though, deciding upon the nature of a litigation gets confusing, especially when no clear indicators favor one direction over another. Our second case may not be more complicated than the first, but it is definitely more difficult to pin down as to the genuine nature of its double litigation.

This second case **[C 5-2]**, also from Beirut (12 Ramaḍān 1273/May 6, 1857), involves two plaintiffs from the Shihābs, Sa'da, the daughter of Bashīr II and his second Circassian wife, and wife of Emir Salīm b. 'Abdullah Ḥasan al-Shihābī; and Ḥulā, daughter of Emir Fā'ūr Qa'dān al-Shihābī, and wife of Emir Ḥasan b. 'Abdullah Ḥasan al-Shihābī. The two plaintiffs were sisters-in-law since the defendants were their husbands, the two brothers, Salīm and Ḥasan Shihāb. The representative of the plaintiffs was Ibrāhīm b. Ilyās al-Bāz while the defendants were represented by Ḥabīb al-Saḥḥāb; they both had the required "evidence"—two witnesses each—certifying their rights for representing their respective clients. Sa'da's representative claimed that his client purchased from her husband, on the first of Ramaḍān 1271 (May

18, 1855), a set of properties for a "specific sum" (*thaman ma'lūm*); but her husband, despite the legality of the deal, refused to transfer the set of properties to her. She was therefore requesting from her husband to return (*raf' yad*) the properties to her which she had legally purchased from him.

The other plaintiff, Ḥulā, shared similar claims—that she had purchased from her husband, on the first of Shawwāl 1271 (June 17, 1855), a set of properties which, as in the previous case, had not been delivered by the husband upon receipt of the payment. The plaintiffs' representative had therefore two identical cases which he combined into one and introduced them in court as one. Similarly, the defendants presented their dual case as one and were confronted by the plaintiffs on this basis. The defendants' representative acknowledged the fact that his two clients, the Shihābī brothers, were still in full possession (*waḍ' yad*) of all the properties claimed by the plaintiffs. The plaintiffs' representative, upon the court's request to prove that these properties were in fact purchased and belonged since then to his clients, brought two witnesses who testified that all the named properties in the representative's statement belonged indeed to the latter's two clients. The court therefore agreed upon the validity of the purchase (*ṣiḥḥat al-bay'*) and requested from the defense that his two clients be advised to "vacate" (*raf' yad*) the properties and deliver them (*taslīm*) to whom they belong. This constitutes the end of the first part of the document.

The text then moves to another (related) litigation which only needs to be temporarily separated from the first before bringing the two together. In the second one, the two previous plaintiffs were now defendants while the plaintiff was Ḥusn Jīhān, wife of Bashīr II and mother of Sa'da Shihāb; her representative was Shaykh Iskandar b. Yūsuf Ḥubaysh. This time, Ḥusn Jīhān loses her case regarding a single property claim. Thus the defendants, the two sisters-in-law, come as "winners" twice—against their husbands and then against Ḥusn Jīhān—even though in the meantime their role had changed from plaintiffs to defendants in two separate litigations presented as one case in court. The purpose of part one was to show first that what Ḥusn Jīhān was claiming—one property—had already been established in a ruling as the property of one of the sisters-in-law. Ḥusn Jīhān in fact claimed a property which the previous *ḥukm* had already secured as belonging to Ḥulā Shihāb. The judge had established in his ruling that the claimed property, a karm zaytūn (olive orchard) in the vicinity of Beirut in the Shuwayfāt desert (the third in the list of properties of Ḥulā Shihāb, Table 5-5), was purchased by Ḥulā from her husband on June 17, 1855. The real problem—which serves only as a preparatory step to set the record—was therefore located in the second part of the hearing: it is only much later, once we are through with the tedious long property lists of the two sisters-in-law and the judge's first ruling,

that it becomes increasingly evident that what this case was really about was that single property (out of the thirty-two listed) which Ḥusn Jīhān claimed for herself. But that order between the two litigations—as enforced by the text itself—could also be indeed reversed, depending on our reading of the case, so as to propose that the first part, involving a massive transfer of properties, was the sole purpose of the case, while the second part only cleared up the status of one of those properties.

Prior to the qāḍī's final ruling concerning the status of that single property, the text goes through all the steps and persons who at some point had either inherited or benefited from this property, beginning with Ḥasan Shihāb, then Bashīr II's brother, and finally Ḥusn Jīhān herself. When Ḥasan died, his inheritance was distributed among his wife, two sons, and four daughters; among them was Layla who was the first one to die among hers brothers and sisters, and part of her inheritance went, among others, to her sister Khawlā (see Figure 4). Khawlā was the next one to die and her husband Qāsim, son of Bashīr II (hence Khawlā's paternal cousin), was among those who had inherited from her. Since Qāsim had predeceased his father, Bashīr II received, in turn, a fraction of this inheritance. Finally, the death of Bashīr II pushed his inheritance towards Ḥusn Jīhān; hence her claim for a fraction of the orchard located in Shuwayfāt.

Table 5-2
History of the disputed property (C 5-2)

What Ḥusn Jīhān's portion of the Shuwayfāt property should have been, according to her representative in court

Beneficiary	**Event (in chronological order)**	**Fraction of the property, in qīrāṭs**
Khawlā bt. Ḥasan Shihāb	Death of her father, Ḥasan Shihāb, and her sister Layla	2 + 1/2 + (1/4)
Qāsim b. Bashīr II	Death of his wife, Khawlā	2/3 + 1/6 (1/8)
Bashīr II	Death of his son Qāsim	1/6 of Qāsim's: 1/3 (1/4) + 1/2 [(1/6)(1/4)] + 1/6 [(1/2)(1/6)(1/4)]
Ḥusn Jīhān	Death of her husband, Bashīr II	1/8 of Bashīr II's: 1/8 [(1/3)(1/4)] + 1/8 [(1/2)(1/6)(1/4)] + 1/8 [(1/6)(1/2)(1/6)(1/4)]

The defense presented a different story. According to this version, Ḥasan had appointed in his will his brother, Bashīr II, as the sole guardian (*waṣī*) to

his children and as the administrator of his succession (*tarika*). Bashīr II found out that his brother died leaving behind a large debt, and the first most obvious step was simply to proceed with its liquidation. Bashīr II appointed two representatives (*wakīl*) for that purpose, which were referred to as *wakīlayn mukhāṣimīn wa-mukhāṣimayn; mukhāṣam,* in the sense of *munāza',* means quarreled, disputed and contended with; *mukhāṣim,* in the sense of *munāzi',* means quarreling and disputing with someone; or a disputant, someone who can pose himself as a *khaṣm* in the judicial process. The legality of the two representatives, the Muṭrān Ghunyāṭyus Ṣarrūf and Yūsuf Bākhuṣ (Bākhos), was certified by a Maronite qāḍī, Mārūn al-'Aẓm.

An estimate was then accomplished on the succession (*tarika*) and it was found that it was inundated with losing debts (*mustaghraqa bi-duyūn ghurmā'a,* from *ghurm,* meaning *khisāra,* loss); and it was then decided to sell the *tarika* in order to fulfill the loss (*li-ajl al-ghurmā'*). To minimize the loss, Bashīr II sold and then bought all the *tarika* for himself; he thus paid for all the debts and gave what remained of the property to his nephew 'Abdullah who was a minor at the time. The *tarika* has thus been "withdrawn" (*khurūj al-tarika*) from its original beneficiaries (the ones the plaintiff, Ḥusn Jīhān, allegedly belong to) and transferred to another line of beneficiaries, that of the defendants. After two witnesses were brought by the defense to corroborate its claim to the property, the judge ruled that it does indeed belong to Ḥulā Shihāb.

Once the judge has been identified from line one, the text immediately introduces the representatives on both sides. In the margin of the text was vertically added the names of four witnesses: two certifying the genuine nature of the *wakāla,* the "right of representation" of the two emirs, and the two others were for the emirs' wives. There was no need here, as in the previous case of Bashīr II (C 5-1, see also C 6-1), to begin with a debt-procedure in order to certify (*iqrār*) the identity of any of the two representatives: Is this then an indication that the litigation was genuine? Not necessarily. In the previous case, it was the defendant that came with the required evidence and "won" her case on that basis, while here, the plaintiffs who "won" their case also provided the evidence. Since for the Ḥanafīs the burden of proof shifts to the defendant once the plaintiff is unable to furnish an acceptable *bayyina* for her claim, the identity of the defendant's representative, if there is one, is double-checked as a preemptive step in preparation of the defendant possibly winning the case. In fact, a plaintiff "is not expected to litigate unless he comes forth with the evidence that matches his case, so that once the judge finds it convincing, he will then issue a ruling based on that evidence."[76] The point here is that plaintiffs are normally *expected* to prepare their cases based on the evidence

76. Ibn 'Ābidīn, *Radd,* 5:548.

at their disposal—otherwise, why bother? Despite such expectations, and as I argue in the chapter on torts and crimes, plaintiffs did often litigate without any shred of evidence at their disposal.[77] That does indeed seem a bit strange, except that courts became more and more routinized with litigations-cum-procedural fictions, thus considerably reducing the volume of genuine ones (C 7-1 & 7-2). To state things a bit differently, plaintiffs were not expected to wrap up their claims with evidence precisely because of the pre-trial arrangements they had worked out with their alleged defendants: the latter either provide evidence and thus rebuke the plaintiffs' claims (C 5-1), or deny and take oath, or even simply deny with no oath at all (see Chapter 11 *infra*). In all cases, the purpose was to have defendants win. The previous case of Bashīr II points to an interesting technique: the plaintiff provided her own version of the story, piled up statements and claims, only to realize that she neither had any written evidence nor any witnesses for that matter. But the defendant did. That might indeed seem absurd except that in fictitious litigations the purpose of a plaintiff's statements is to provide a narrative whose truthfulness would be denied by the judge's ruling—rather than to provide evidence. That narrative would then be eliminated—as "false" and improbable—in potential litigations regarding the same set of properties (or part of them). Only what the defendant said, confirmed by means of a ruling, would stand out as absolutely true and valid. In short, the distribution of roles between plaintiffs and defendants in fictitious litigations depends on a number of factors, chief among them is the narrative structure: What is it that ought to be said so as to establish an irrevocable ruling? Thus, plaintiffs and defendants would exchange roles depending on the complexity of the case and what ought to be told and what needs to be hidden, and, again, either party would "win" or "lose" depending on what needs to be said—the narrative.

The Sa'da and Ḥulā case, comprised of two litigations wrapped into one, does pose few problems (see synopsis, Table 5-3). Considering the importance of all twenty-three properties (Tables 5-4 & 5-5), is it possible that their ownership status was left uncertain for two years until Ḥusn Jīhān claimed one of them?[78] If we were to believe the document literally, Sa'da and Ḥulā Shihāb decided to take action against their respective husbands only when Sa'da's mother claimed one of the properties, so that in the interim the status of all those properties remained uncertain. That looks indeed improbable. More realistically, the second litigation prompted the first so that it was Ḥusn Jīhān's

77. See Chapter 11 *infra.*

78. The text remains elusive about anything from a written contract to the prices set for both purchases. However, only specific dates were noted in both instances (May 18 and June 17, 1855). That's as far as the text can go in terms of specificity.

request of that single property that pushed for the first action. In that case, the first litigation is quite probably fictitious while the status of the second remains uncertain. Or, as noted before, the sole purpose was the transfer of properties—which seems the most likely solution—but the status of one of them needed clarification, hence Ḥusn Jīhān's action—probably on friendly terms. Before going into more detail, the following chronology is worth remembering: 1) The plaintiffs allegedly purchased their properties from their husbands on May and June 1855, or two years prior to the present hearings. Since they were not in such a hurry to push forward their claims, what prompted them on May 6, 1857 to finally claim all properties? 2) We have to keep in mind that the Sa'da and Ḥulā case precedes that of Bashīr II by several months, so that Ḥulā won her case against her sister-in-law's mother first over a single disputed property, and then the mother succeeded a few months later against her own daughter in recuperating the totality of her deceased husband's estate. (I have changed the chronological order of presentation simply because the Bashīr II case gives a better picture of the emir's inner family, and it also provides with a classical example of a fictitious litigation—in particular its debt-procedure and the unlawful usurpation claim—while the Sa'da and Ḥulā case is more uncertain in that regard.)

Classical legal manuals of the *adab al-qāḍī* type and fiqh manuals abound with notions on the status of the *wukalā',* the fact that a disputant could have, if she wishes, more than one representative in court; and that the act of representation could be either total, so that the representative *becomes* his client in any legal act imaginable, or partial—only specific legal matters are open to the representative; moreover, the act of representation becomes null and void once the *muwakkil* dies, and, in this case, the representative is not allowed to inherit (unless he is himself one of the beneficiaries).[79] The fact that both representatives were not from the Shihābs but from families close to them and known to have collaborated with them in one way or another (as tutors and educators to their children, tax-farmers, etc.), raises some interesting questions about this type of representation from outside the family. For one thing, such a representation could be different from the more familiar ones with a direct family link: usually, for example, women were represented by a male figure in the family (father, uncle, husband, or brother). When representatives were from "outside" the family, were they sought for because of their legal expertise? Did such representatives, in societies where no professional lawyers existed yet, act on behalf of their clients as legal experts of some kind? And if so, did they discuss legal and court procedures with the

79. See, for example, 'Umar b. 'Abdul 'Azīz, *Sharḥ adab al-qāḍī li-l imām Abī Bakr Aḥmad b. 'Umar al-Khaṣṣāf* (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), 428-447.

judges? In the absence of systematic studies on the phenomenon of *tawkīl,* we can only vaguely speculate as to what representatives did with their clients and in court.[80] Since those representatives were not family relatives, and in particular for wealthy Maronite families with large property transfers at stake, it seems improbable that the *wukalā'* had no legal expertise. If they did, their expertise, as Christians, did not go through the traditional family and school ties with which the Muslim fuqahā' were trained. Such a legal education was probably private, partly through family ties, and partly from the legal experts in the Maronite Church (and the community itself) which, in order to survive, had to master both canon and Ḥanafī laws.

The text then specifies that this case was at the same time a *da'wa* and a *khuṣūma.* The notion of legal suit, *da'wa,* is the most obvious since it implies "requesting one's right (*ḥaqq*) from another person in the presence of a judge" (Majalla, art. 1613). What does then the notion of "conflict" (litigation), *khuṣūma,* add to that of lawsuit? Could there possibly be a *da'wa* without a *khuṣūma?* The notion of *khuṣūma,* in conjunction with the *da'wa,* was known in classical Ḥanafism but it seems to have broadened into a set of procedural fictions in Ottoman times. It was necessary for the judiciary to create a set of rulings, *aḥkām,* which would not be easily revoked, thus *khuṣūma* metamorphosed into a legal device (*ḥīla*) used by judges to corroborate a specific event, or *ḥāditha* (e.g., the identity of a representative). In short, it was one of those devices—created probably by the practice of the courts themselves rather than by the jurists—which served as a leeway to link the *khuṣūma* with the *ḥukm* in order to establish an irreversible ruling. It could have also served to limit the number of appeals in courts. Thus, when the text describes the two defendants' representatives as a *khaṣm jāḥid li-l-tawkīl,* the purpose was to frame an opponent with whom the plaintiffs had, in the language of the jurists, a "valid litigation" and who was also an opponent denying and disavowing what the plaintiff was claiming. Ibn Nujaym complained that "the judges in our time and before got into the habit of ruling without a lawsuit and litigation [*khuṣūma*] so that questions were raised on that matter in Cairo, to which I replied in many fatwās that such rulings were invalid."[81] The point here is that unless a ruling is linked to both a lawsuit and a "valid litigation [*khuṣūma ṣaḥīḥa*]," there would be nothing to differentiate it from a fatwā. Indeed, a fatwā could be purely hypothetical—a matter of question and answer on something that did not happen—while rulings must be linked to a "unique

80. Ḥabīb Saḥḥāb, the representative of the two emirs in court, owned several properties in the Shuwayfāt region South of Beirut. See Table 5-4 and Table 5-5 for the list of properties of Sa'da and Ḥulā Shihāb.

81. Zayn al-Dīn Ibn Nujaym, *Rasā'il Ibn Nujaym* (Beirut: Dār al-Kutub al-'Ilmiyya, 1980), 281.

event [*ḥāditha*]" that could only be solved through a judge's arbitration. (Responsa too could be unique, and in that case are referred to as *ḥādithat al-fatwā,* or the event that prompted a fatwā.) It was thus in Ottoman times that the idea of a ruling as a binding force that was stronger (*aqwa*) than anything else, including fatwās and ḥujjas, finally crystallized around the two notions of "event" and "litigation." The sharī'a courts then used and abused of all these notions to the point that a procedural fiction-cum-contractual settlement was preferable to a plain contract.

The text then introduces the plaintiffs' representative's claims concerning the set of properties Sa'da Shihāb allegedly purchased from her husband. The Ḥanafīs accept that acts of buying and selling between members of the family in its restricted sense, as between husband and wife, might be orally performed, that is, with no need for a written document. That explains why witnesses rather than documents were introduced throughout this case (in its two parts) and no sums of money were specified as to the overall value of these properties (the traditional *bi-thaman qadruhu ma'lūm* was the only reference to price and value). But even though the Ḥanafīs neither require written contractual evidence, nor the specification of a particular sum for the purchase—not even a specific date—all such non-requirements served well for all purposes in procedural fictions.

Next follows a long list of properties. Such lists are commonplace in sharī'a documents and usually constitute one of their most trustworthy empirical parts which historians would love to make use of, even though neither their factual existence was ever seriously questioned by the courts, nor their ownership for that matter—it's more a question of trust: as long as the other party does not challenge the listed properties either in toto or in part, the judge proceeds with his ruling. Court procedures allow the plaintiff(s) to list *in extenso* all the claimed properties even if they have no way of proving that they exist as described (or that they exist at all), or that the claim is valid. It is indeed a fundamental Ḥanafī condition for a valid litigation to list all disputed properties based on their borderlines (*ḥudūd*), their function, and location.[82] Besides, even when the judge accepts the plaintiff's claim for the set of properties, their existence, location, and description is only confirmed by a couple of witnesses (usually two are enough), which means that the judge would never send an expert on his behalf to locate and describe the properties for him.

Sa'da Shihāb claimed for her part that she had purchased from her husband, two years before the hearing, on May 18, 1855, a set of fifteen properties located in Shuwayfāt, Beirut, Jounieh, and Ghazīr (Table 5-4). The Shihābs who were the rulers of Mount Lebanon until 1840, and who had established

82. Ibn Nujaym, *Rasā'il,* 361.

their own power from its *muqāṭa'a* system by being at the top—as emirs—of all *muqāṭa'jī*s families, accumulated their wealth from state *mīrī* lands which were granted to them as iltizām. But when it came to investing in property as *private property,* the Shihābs opted for lands close to the coastal cities which were *milk.* Thus the Shuwayfāt desert, South of Beirut, was mostly owned by the Shihābs. Among the fifteen properties claimed by Sa'da Shihāb, three were located in Shuwayfāt in the vicinity of Beirut, five in Beirut itself, three in Jounieh, and four in Jabal Kisruwān (including one in Ghazīr). Those properties consisted mostly of lands with olive or lemon plantations, a few houses, and shops in Jounieh. The other small- and medium-size nearby properties which were listed to locate the ones under scrutiny—those that surrounded the first eight properties in Shuwayfāt and Beirut—were mostly owned by the Shihābs too, for the most part parcels of lands with olive and lemon plantations in the vicinity of rivers and water-canals. The other proprietors, besides the Shihābs, were either "middle class" Christians (some were like the Shihābs themselves, Maronites), or Druze like the Junblāṭs who helped the Shihābs consolidate their power in the Druze areas of the Shūf. Thus even the most powerful muqāṭa'jīs families, which made their fortunes by farming state-owned *mīrī* lands, invested long before their decline into small *milk* properties. That was decisive for the Shihābs, in particular for the troubled period of the 1850s and later when they lost their status as a ruling muqāṭa'jī family. What is interesting about those milk properties was their pattern: for one thing, they were not open to competition so that anyone would come in and own; they rather followed the political pattern of *ahl* and *qarāba*—those who were with "us" politically, belong to us, and are part of our political territory. Thus the pattern of land ownership reproduced that of the power-relations among the muqāṭa'jīs and other related families which were subservient to them. This pattern, whether in politics or land ownership, did not necessarily follow a purely religious (confessional) basis—it was not solely based on the *ṭā'ifa* as such: indeed, other families, such as the Junblāṭs, joined in because of their assimilation within the hierarchy (*tarātub*) of power created by Shihābī polity

The seven remaining properties in Jounieh, Jabal Kisruwān, and Ghazīr, all North of Beirut, follow a similar pattern, but there are major differences too. In contrast to the first eight in Shuwayfāt and Beirut, the Jounieh and Ghazīr properties exhibit more variation: shops, farms, houses, and lands with plantations. Those were all in association (*sharika*) with others, and the text denotes such patterns of ownership "in common" as a *ḥiṣṣa shā'i'a* (or *shāyi'a*), while the others in the vicinity of the Shihābī properties were not even owned by the Shihābs or other related families in Mount Lebanon such as the Junblāṭs. Jabal Kisruwān was traditionally the stronghold of the Maronites for several centuries and saw the rise of the Maronite church and

leading families such as the Khāzins. The Shihābs, who were originally Sunnīs from Ḥaṣbayyā and Rāshayyā and secretly converted to Christianity late in the eighteenth century, were never strong in Kisruwān (even after the demise of the Khāzins); they constructed their power base by ruling in central Mount Lebanon, a region traditionally ascribed to the Druze. But it was the shift in power from the Maʿans (whose confessional identity was uncertain) to the Shihābs that modified the demographics of Mount Lebanon. Thus, in the nineteenth century, with Maronites coming from the North, the Druze were no more a majority (while the Shīʿīs lost some control too and were constrained further South, in Jabal ʿĀmil).

The conflicting relations the Shihābs nurtured in Mount Lebanon and the other coastal muqāṭaʿāt in its vicinity partly explains their landholding patterns in areas they traditionally did not dominate well—which, surprisingly, were the areas they had invested in the most in terms of land ownership. Thus the Shuwayfāt desert, with its solid Greek Orthodox population, was administratively, after it was taken from Mount Lebanon, part of the province of Sidon, a Sunnī region with a wālī whose power often rivaled that of the Shihābs and who was their main *casse-tête*. That, however, did not prevent the Shihābs, with other muqāṭaʿjīs, from heavily investing in that region. On the other hand, their properties in Jabal Kisruwān were much more fragmented and mostly in association with others. That was a region, as Table 5-5 shows, with a number of Christian waqfs and small and medium-sized properties for the Christian "middle class."

Once the plaintiffs' representative was through with his first list of properties, he made his request to the defendant to "vacate" (*raf' yad*) the wife's properties. Then follows another list of properties that Ḥulā Shihāb allegedly purchased from her husband on June 17, 1855 (a month later than her sister-in-law Saʿda). The set of seventeen properties (Table 5-5 *infra*), four in Shuwayfāt, seven in Beirut, and six in Jounieh, Kisruwān and Ghazīr, reflects a similar pattern of distribution and ownership to the previous ones above. As before, the representative reiterates an identical claim for Ḥulā Shihāb, prompting the two emirs to give back all the properties which their wives had purchased from them. Upon the defendants' representative's denial that these properties were purchased by the two sisters-in-law from their husbands, the plaintiffs' representative brought two witnesses who both testified (on oath) of the truthfulness, in letter and spirit (*lafẓ-an wa maʿnan*),[83] of the plaintiffs' representative statements. The judge, having accepted the two witnesses' testimonial evidence, ruled that all the aforementioned properties belong to the

83. The distinction between the form and content of speech (the *lafẓ* and *maʿna*)—or rather speech in its *written* form as delivered in the court-documents—was crucial since disputants, witnesses, and judges,

two plaintiffs. Thus, in the final analysis, testimonial evidence was the most crucial step and it turned out enough as *bayyina* in itself since the defendants had no valid counter-arguments.

This first part of the hearing could indeed be taken at face value—as a genuine litigation—the two sisters-in-law were requesting that their purchased properties from their husbands be returned to them, and there is nothing more to it. However, in light of the previous cases (and the ones to follow), their tricks and turns, not to mention arguments propounded by jurists concerning the ambiguous status of state owned mīrī lands,[84] in addition to the declining status of the Shihābs since the 1850s, there is enough ground to be at least suspicious. The other alternative would not be a genuine act of buying and selling, but a friendly transfer among spouses simulated as a litigation. If that's the case, then the sisters-in-law (and their husbands) would have preferred a *ḥukm* over a *ḥujja* on the basis that a ruling would be more solid. There is no way to prove either possibility "once and for all," but the second alternative might be more likely in light of an overall tendency of property transfers among the Shihābs right after their political demise. Interestingly, despite all the suspicions the Shihābs nurtured towards their women (as reflected for example in the waqf of Bashīr III, C 6-1 *infra*)—and encouraged by Maronite law—these vast properties and estates concluded their trajectory in the hands of women. But one of the purposes of fictitious litigations was precisely to provide for an alternative—leaving women out of property ownership, or the administration of waqfs for that matter—and then show that things couldn't possibly work out that way (lack of male beneficiaries, or the latter still haven't reached the age of maturity, etc.), hence the necessity of a woman taking the lead (C 6-1). Moreover, in periods of great political uncertainty and social unrest, transferring properties to women might have proved a safer option, considering in particular the danger of political confiscation.

Ḥusn Jīhān, with Shaykh Iskandar Ḥubaysh as representative, claimed a single property only—the third one of Ḥulā's properties, a land with olive plantations in Shuwayfāt (Table 5-5). Despite the fact that this property was

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could have made the claim that what they said at a particular moment was not to be taken at its face value because the "inner" meaning goes deeper than the *ẓāhir.* Thus the Majalla in 1877 made it plain in its third rule that "contracts should be considered according to their purpose (*maqṣad*) and meaning (*ma'na*) and not their literal meaning (*lafẓ*) and syntax (*mabānī*)." Thus, even though the final rulings of the courts should limit themselves to the *ẓāhir* of an individual's action, in contracts, the *manifest* purpose turns out to be the most crucial since, as 'Alī Ḥaydar, who gave one of the most acknowledged interpretations of the Majalla, put it, "the real thing is the meaning and not the literal form (*lafẓ*)," and "the literal external sense is only the form (*qawlab*) to meaning (*ma'na*)." See 'Alī Ḥaydar, *Duraru al-Ḥukkām sharḥu Majallat al-aḥkām* (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 1:17ff.

84. See Chapter 4 *supra*, in particular the notion of lawful (and rightful) "occupation."

in Ḥulā's ownership, both Ḥulā and Sa'da were on the defendant's side; the reason is that all these properties, including the one under scrutiny, were originally part of the estate of Ḥasan Shihāb, the brother of Bashīr II, and hence clearing out the status of one of them requires scrutinizing of the original estate. Basically, according to the plaintiff, Ḥusn Jīhān, this property went back and forth between two generations of the Shihābs. It all began when Ḥasan Shihāb who, upon his death, had his estate divided between his wife, two sons, and four daughters (Maronites had to follow the Ḥanafī rules of succession). Then upon the death of one of the daughters, Layla, Khawlā, her sister and wife of Qāsim, son of Bashīr II, took a double share from her father and sister (see Figure 5-3). Then Khawlā herself died, and her husband inherited a fraction of her properties. Then, Qāsim having predeceased his father, a fraction of his inheritance was added to Bashīr II's estate. Finally, Bashīr II himself predeceased his wife, Ḥusn Jīhān (the plaintiff), and thus a fraction of the Shuwayfāt property should have in principle become hers.

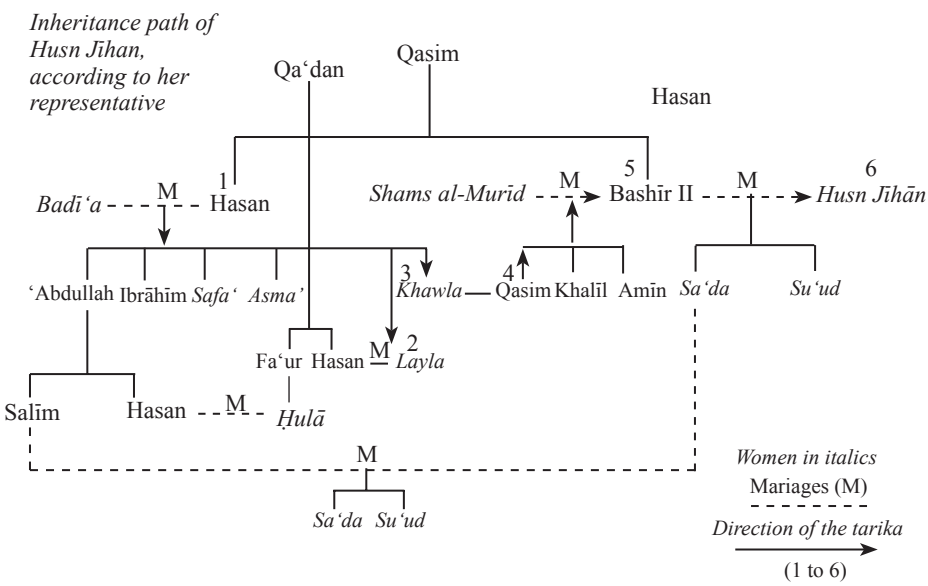

Figure 5-3. Trajectory of the disputed property (C 5-2).

Commentary: All the men and women in this genealogical chart—with the notorious exception of Ḥusn Jīhān—were linked to Qāsim and Qa'dān Shihāb and implicated in the set of properties in cases 5-1 & 5-2. As the Shihābs routinely intermarried among cousins precisely to avoid the fragmentation of their properties and transfer to "foreign" hands, it is therefore ironic to see that it was an "outsider" like Ḥusn Jīhān at the center of two major litigations. In fact, the movement of the inheritance, from Ḥasan Shihāb (1) to Ḥusn Jīhān (6), shows an unexpected path towards the latter. Property disputes of this caliber, which were no more than conveyances-cum-procedural fictions, typically took place within closely linked family ancestors, whose descendants intermarried, rather than the family at large or the clan.

Thus, according to the plaintiff's scenario, the Shuwayfāt property should have shifted hands between six different proprietors among two generations of the Shihābs, the first being that of Bashīr II, his two wives and brother, while the second included all their sons and daughters. Since some of the younger generation had predeceased their elders, this fraction of the estate went back to where it had originated, but in the other direction, that of Bashīr II and his second Circassian wife. As is common in such cases, the text calculates each share for the five beneficiaries, following strict sharī'a rules of inheritance (Table 5-2)—a domain where the text is constructed on "expertise," counterbalancing the other more problematic areas of witness-belief and corroboration.

The representative, in his concluding remarks, addresses both Ḥulā Shihāb and her husband Ḥasan on the basis that it was the husband who had "possession" (*waḍ' yad*) of the *karm,* which he then sold to his wife: "I request from both the seller and his wife to vacate (*raf' yad*) the share of my client and give it back to her." Logically, however, since that one share with the other related properties was already "purchased" by Ḥulā, there was no reason why her husband should have been brought back to the second part of the hearing, only to be addressed in those terms—by posing him as some kind of "associate" to his wife. It also needs to be explained why the two parts were brought together in a single case: after all, the thirty-two properties "purchased" by the two sisters-in-law were worth having a case on their own.

The defendants—now the sisters-in-law—maintained their own compelling version of the story to the end. According to their representative, Emir Ḥasan Shihāb had appointed in his will his brother Bashīr II as guardian to his small children and to take care of his debts, in the case that there were any, after his death. Bashīr II found that his deceased brother was inundated with debts to the point that he thought it wise to appoint two representatives (certified by a Maronite judge) especially for that purpose. The succession was then assessed, sold, and purchased by Bashīr II himself (the intermediary step of "selling" seems more legal than real, probably a way to make the point that the succession was properly evaluated rather than simply "appropriated" for convenience by Bashīr II),[85] who then gave it to his nephew 'Abdullah. The latter was thus able to cover some of his father's debts while the rest was

85. In the legal fiction where the imām (or sultan) is appointed as guardian over the "interests" of all Muslims so that the massive ownership of lands by the state is legitimized and accepted as "property of the sultan," the latter can buy for himself any of those "private" properties whose kharāj-payer died without heir, but he needs first that someone proposes to sell it, and then purchase it for himself. The contract of sale would thus look more "impersonal" and not dictated by personal greed or an abuse of power, see, Ibn Nujaym, *Rasā'il,* 51.

compensated by Bashīr II. As a result, the inheritance was no more the sole legal right of its beneficiaries (*kharajat al-tarika ʻan kawnihā mustaḥaqqa li-l-waratha*) but had been narrowed down to ʻAbdullah. The latter then sold part of his properties to his son Ḥasan who, in turn, sold it to his wife, and the orchard itself was part of the transaction.

Upon the denial of the other party, the defendants' representative furnished two witnesses acting as proxies to two others (*fur'ayn ʻan aṣlayn*).

> I take oath on behalf of the originals above and certify that Emir Ḥasan b. Qāsim Shihāb, when he was alive, appointed his brother Bashīr, ruler of Mount Lebanon, as the sole guardian of his small children and to cover his debts. Emir Ḥasan died defending his will, and was found indebted and asked [for compensation] from the believers. His brother, the appointed guardian, had set two representatives who were given the power to initiate and receive litigation, and to represent him: the Muṭrān Ghunāṭyus ṣarrūf and the Khawāja Yūsuf Bakhos, [whose power to represent] was certified and legalized by the judge and pastor Mārūn al-ʻAḍm. The debts were estimated and the inheritance assessed with all his belongings, and it was found that the [indebted amount] was large. As a result, his brother, the appointed guardian, found it best to sell the inheritance because of the loss [*ghurmā'*] and pay [his brother's] debts. Once he took possession of the inheritance, he sold it and then bought it for himself to the benefit of his little nephew for the same value. He added the loss on the little boy's fund, based on what he should have paid,[86] and the [creditors] were cashed from the [boy's] money and the rest of their debts were paid to them from the guardian's money as a contribution [*tabarruʻ*] from his part on his brother's behalf.

Having approved the two witnesses' testimonies, the judge ruled in favor of the defendants. Strictly speaking, what Bashīr II allegedly did with his brother's inheritance was in conformity with the law. It remains to be seen, however, why ʻAbdullah out of the six children was the only one to have fallen under Bashīr II's grace, considering that he was appointed guardian of all six. Even in the case of a possible preference for the male beneficiaries, favored by Maronite law, there were two of them: ʻAbdullah and Ibrāhīm, both of which, as stated in the document itself, were alive upon their father's death; and unless Ibrāhīm prematurely died when his uncle was liquidating the inheritance, there is no obvious reason (for the moment) as to why he was excluded from Bashīr II's benevolence.

86. More accurately: the original value of the debt, that is, the "loss," having been purchased by Bashīr II, its value has been added to his nephew's fund.

A specific ruling

Ibn Nujaym, who had witnessed in Cairo the transition from the late Mamlūks to the early Ottomans, forcefully coined this category of *al-ḥukm bi-l-mūjab,* a ruling that whould be solely based on what the case in question *specifically* poses to the judge. Judging based on a lawsuit means that the judge "contemplates the suit, so that if it includes what establishes the validity of the contract upon which an action was initiated, he then rules accordingly [*bi-mūjabi-hā*] in a way that establishes the validity of the contract. But if none of those conditions are met, then, accordingly, the ruling cannot confirm the validity of the contract. Thus, *al-ḥukm bi-l-mūjab* is a ruling over a contractor [*ḥukm 'ala 'āqid*] in such a way that it binds him personally to the contract [*bi-mā yuthbat 'alayhī mina al-'aqd*], and is therefore different from a ruling upon a contract [*ḥukm bi-l-'aqd*] which establishes the validity of the text *per se*."[87] What use can we make of such a distinction? The point here was to work out a distinction that differentiates between a valid contract which the judge approves, on the one hand, and the way the contracting parties are legally bound to the contract, on the other. So that if the contracting parties are fighting in court over a clause of the contract, the judge, even though he will have to check the validity of the contract, his ruling will nevertheless have to be specific to the obligations that tie the parties to each other. Moreover, rulings that establish the validity of a contractual arrangement are known as *al-ḥukm bi-l-ṣiḥḥa,* and are hence different from those that discuss the status of the contractors. Such a distinction, Ibn Nujaym notes, was not known to the three founders so that for a long time the basis of what is a valid lawsuit has remained a confusing issue.[88] Hence the related notion of a "factual ruling [*al-ḥukm ḥāditha*]"—or a ruling based on a case, an event—which in turn is based on a "valid litigation [*khuṣūma ṣaḥīḥa*]."[89] Interestingly, even though Ibn Nujaym did not discuss the possibility of "fictitious litigations" (Ibn 'Ābidīn did so *in extremis*), the purpose here behind such distinctions was precisely to favor rulings based on genuinely valid litigations. In fact, if "*al-ḥukm bi-l-mūjab* is a ruling upon a contractor so that it establishes his obligations towards the contract, and not a ruling over a contract,"[90] the purpose of a fictitious litigation would precisely be to reverse that formula so that the contractual settlement-cum-procedural fiction would become the sole purpose of a judge's ruling, even though the litigation itself would falsely point in the direction of

87. Ibn Nujaym, *Rasā'il,* 286.
88. Ibn Nujaym, *Rasā'il,* 285.
89. Ibn Nujaym, *Rasā'il,* 282.
90. Ibn Nujaym, *Rasā'il,* 236-37.

the contractors (disputants). Indeed, it is in the nature of fictitious litigations to pose themselves as "valid," meaning incorporating a genuine *khuṣūma,* while in reality they are nothing but simulated contractual settlements.

To understand how such a reversal occurs, we need to look, once more, at our two cases, but this time in their chronological order. In the Sa'da and Ḥulā Shihāb case, it was the second litigation that necessitated the first. Ḥulā Shihāb thus kept the only property that Ḥusn Jīhān had claimed. Moreover, Jīhān's daughter and her sister-in-law secured two dozen properties from their husbands. Few months later, in another litigation, the mother secured an absolute ownership over her husband's estate—against her daughter's claims. In the two cases combined, the three women (mother, daughter, and sister-in-law) took over large estates from their husbands. The transfer of properties to Shihābī women, which is also noticeable in waqfs (C 6-1), was probably a trend of that period—right before the 1858 Land Code and the 1860 confessional massacres, and also before the advent of a unified *Mutaṣarrifiyya*—and that probably constituted a preemptive measure against possible confiscation of some or all of those "political" properties. This all suggests that we are in the presence of contractual settlements rather than genuine litigations. The case of Sa'da and Ḥulā could thus be read as a successful attempt to secure *first*—even though the text does reverse that order—the status of a single property, which was uncertain, so as to fully transfer the two-dozen properties to the sisters-in-law. Quite probably, while working out the modalities of the transfer, the concerned parties realized that the status of one the properties needed some status update—hence the two parts. Thus, the purpose *was* to transfer those properties to the two sisters-in-law, and, in the meantime, the nagging ownership of one of them was settled—the litigations were hence *in toto* fictitious; the same applies to that other litigation between mother and daughter several months later (C 5-1).

In the language of Ibn Nujaym, both cases should have in principle been classified as a *ḥukm bi-l-'aqd,* meaning a ruling in which the judge passes his approval over a contractual settlement, one that is overtly stated as such. The purpose of fictitious litigations, however, was precisely to bypass such rulings and opt for "stronger" ones that also incorporated a valid *khuṣūma.* The latter would give an undeniable advantage since they would permit the contracting parties, while simulating their litigation, to construct complete narratives—ones that would include full descriptions of properties, their past and present status, details of oral or written waqfiyyas, and claims and counter-claims—and hence would secure an irrevocable ruling. The contractual settlement is now on safer grounds, at least for the immediate generations to come, protected by a court's ruling.

Even though the 1858 Land Code was only a year away, it would be immature, however, at the present state of research, to rush towards conclusions and read the Code as an attempt to legitimize what was already taking place on the ground. What needs to be done first is to go back to earlier periods—the eighteenth century in particular—and check if such fictitious litigations involving land-transfers did exist. Was the form (formula) the same, and if so, would it be possible to establish a time framework that would tell us when it all began? If it turns out, as I suspect it does, that such practices were even common for part of the eighteenth century, it would then be hard to give a persuasive argument as to the necessity of the 1858 Code based solely on such regional practices—that would imply that the central authorities finally reacted to practices that were common ground for over a century! It would indeed be more realistic to look at the 1858 Land Code as an event that was dictated by a series of related events throughout an eventful nineteenth century, chief among them, the Tanẓīmāt and their sweeping legal reforms; the desire to modernize the iltizām system; a better integration of the empire with world-capitalism; the ideology of modernization among élite groups (including the military), which Muḥammad ʻAlī of Egypt began effectively applying; and the commercialization of land and the creation of new taxes out of the land-reforms, not to mention all diplomatic and military pressures against the sick man of Europe.

Table 5-3
Synopsis of Sa'da and Ḥulā Shihāb Case (May 6, 1857) (C 5-2)

Step # I	Plaintiffs: Sa'da & Ḥulā	Defendants: their husbands, Ḥasan and Salīm Shihāb	Judge	Observations
1	Representative claims that Sa'da "purchased" from her husband on May 18, 1855, a set of 15 properties, 8 in Shuwayfāt, and 7 in Jounieh and Ghazīr, which her husband refuses to acknowledge.			Alleged purchase occurred two years prior to present hearing.
2	Representative makes a similar claim for Ḥulā regarding a set of properties purchased from her husband on June 17, 1855, a total of 17 properties, 11 in Shuwayfāt and 6 in Jounieh and Ghazīr.	Representative denies plaintiffs' claims.	Judge requests evidence from the plaintiffs.	No written contract unveiled and no sums specified for both purchases, but only specific dates.
3	Claims corroborated by means of two witnesses.		Judge accepts testimonies of the witnesses and rules in favor of the plaintiffs.	Why did the plaintiffs wait two years to press their claims?
II	**Plaintiff: Ḥusn Jīhān**	**Defendants: Sa'da & Ḥulā**		
4	Representative claims one of Ḥulā's properties which she allegedly inherited from her husband, Bashīr II. Inheritance path explained.	Representative denies plaintiff's allegations and explains that the disputed property was originally owned by Ḥasan Shihāb, brother of Bashīr II. In his will Ḥasan had appointed his brother as guardian for his children, and upon his death, his inheritance had a large debt, which prompted Bashīr II to sell it and buy it for himself, and then give it to his nephew 'Abdullah, father of Ḥasan (husband of Ḥulā) and Salīm.		Why was 'Abdullah the only beneficiary who received Bashīr II's big favor?
5	Representative denies defendants' reply and requests for evidence.	Two witnesses corroborate defendants' claims.	Judge accepts testimonies and rules in favor of defendants.	Was part I completed solely for this final ruling?

Table 5-4
Properties of Sa'da Shihāb (allegedly purchased from her husband, May 18, 1855) (C 5-2)

#	Property	North	South	East	West
1	Land with olive plantations (*karm zytūn*) located in the desert of the Shuwayfāt village (al-Gharb al-Taḥtānī, muqāṭ"a'at Mount Lebanon, part of Eyalet Sidon).	*Milk*[91] of the Jew 'Abbūd Sha'bān, and milk of Yūḥannā Mitrī.	Milk Ḥabīb Fayyāḍ, and milk of the children of Mitrī Nāṣīf Ḥannā.	Milk Emir Ḥasan.	Milk Khawāja[92] Isḥāq Thābit.
2	Land with olive plantations (*karm zaytūn*) located in the above desert in #1, in the place known as Abī al-Jāmi'.	Milk of the mother of Emir 'Abbās al-Shihābī.	Milk Nāṣīf Abī Ghānim.	Milk Ḥājj Muṣtafa Bayhum, and milk of the mother of the Emir 'Abbās al-Shihābī.	Milk Nāṣīf Abī Ghānim, and the mother of 'Abbās al-Shihābī.
3	Land containing olive plantations in the same location as above (#1 & 2), in a location known as Rubā' Qayqab.	Road.	Milk Sa'īd Bek Junblāṭ.	Milk Sa'īd Bek Junblāṭ, and milk Nāṣīf Shublī al-Bardawīl.	Milk Emir Manṣūr al-As'ad al-Shihābī.
4	*'Aoudah*[93] located in the *ṭaḥwīṭa*[94] of the city of Beirut and which contains mulberry trees.	Winter water canal (*majra mā' shatwī*); and river.	Milk Ya'qūb Thābit, and Lady Nūr, wife of Emir Manṣūr Shihāb, and Lady Badr, wife of Emir Rashīd Shihāb; and property of Ḥabīb Saḥḥāb.[95]	Milk Khawāja Ya'qūb; and river.	Winter water canal (*majra mā' shatwī*); and river.
5	House located within the small garden (*ḥawsh*) of the aforementioned *taḥwīṭa* (#4), in its southern part, constructed in stone and with a wooden ceiling.	*Mushā'*[96] of the *ḥawsh*.	Milk of the sons of Ṣāleḥ al-Shammār.	Milk Emir Ḥasan b. Emir 'Abdullah, brother of Emir Salīm Shihāb (the defendant).	Milk Emir Sa'd b. Khalīl Shihāb.

Table 5-4: 1/3

91. In this context, *milk* means inalienable "private property" that denotes absolute ownership. Most properties in this list fall under this category.

92. Title (of respect) reserved for the Christian males of a particular social status ("middle classes" and beyond).

93. Land with lemon plantations.

94. A common term in the *'āmiyya* for a small wall (in French: *muraille, rempart*) or for a set of houses in a circle, see Jabbūr 'Abdel Nūr, *Mu'jam 'Abdel Nūr, 'Arabī-Faransī* (Beirut: Dār al-'Ilm li-l-Malāyīn, 1983), 261.

95. Representative (*wakīl*) of the two emirs.

96. *Mushā'* (also *shā'i'* or *ḥiṣṣa shā'i'a*) could either refer to a common public property, or to a property which is *mushtarak,* that is, in common or in association with someone else. Since it is unlikely that the *ḥawsh* was public property, it thus seems that it was commonly owned.

#	Property	North	South	East	West
6	Olive tree plantations (*karm*) in the taḥwīṭa (#4).	Road.	Milk Khawāja Isḥāq Thābit and Ḥabīb Saḥḥāb	Milk Khawāja Isḥāq Thābit and Ḥabīb Saḥḥāb.	Milk Rashīd Qāsim Shihāb.
7	Land in the same location as (#4), near the bakery (*furn*) known as Furn al-Shubbāk.	Milk of the mother of Emir Rashīd Shihāb.	Road.	Road.	Milk Ḥannā al-Buwayrī.
8	Two-thirds of the land containing pine trees in the same location as (#4); the remaining one-third is a *sharika* (association) with Ḥabīb Saḥḥāb and Ilyās ʻAkra.	Milk of Isḥāq Thābit and Ḥabīb Saḥḥāb.	Milk Ḥannā al-Buwayrī and Khālid Yammūt.	Road.	Road.
9a[97]	Four qīrāṭs out of twenty-four of the five shops in the village of Jounieh, part of the locality of Zūq Mikāyil in Jabal Kisruwān, known as the dakākīn al-qanṭara, in association (*sharika*) with Ilyās al-Daḥdāḥ for twelve qīrāṭs, and also in association with the two brothers of the seller (*bāʼiʻ:* Emir Salīm Shihāb), the Emirs Ḥasan and Munqidh, for eight qīrāṭs.				
9b	Shops (*dakākīn*) and warehouses (*makhāzin*) located as in 9a and whose shares are divided as follows: • four qīrāṭs to the Emir Salīm Shihāb (the defendant); • twelve qīrāṭs in association with Shaykh Qanṣū Ḥuṣn al-Khāzin; • eight qīrāṭs in association with the two brothers of the seller.				

Table 5-4: 2/3

97. Starting with this property, the locations moves North of Beirut to Jounieh and Ghazīr. I kept the same number (9) for properties 9a-c because they are all in the same location. They are all described as *ḥiṣṣa shāʼiʻa,* that is, owned in common with others. Probably due to their peculiar location, and unlike all the others in the list, properties 9a-c are not localized in respect to the other nearby properties.

#	Property	North	South	East	West
9c	Shops and khān and bakery located as in 9a: • four qīrāṭs to the Emir salīm; • twelve qīrāṭs in association with the Shaykhs sons of Haykal Khāzin; • eight qīrāṭs in association with the two brothers of the seller.				
10	One-sixth of a farm (*mazraʿa*) known as mazraʿat Kafarnakhshah, located in muqāṭaʿat al-Zāwiya, and contains non-cultivated lands (*arāḍī salīkh:* lands without plantations?) and lands planted with all kinds of trees; in addition to few buildings (*ʿamār*) and walls.	Village of Kafarḥūrā'.	Land of mazraʿat Bishnīn, part of the waqf of Dayr Quzḥayyā; and milk of Shaykh Amīn al-Khūrī and Ṣāliḥ and Ṭannūs Ḥubayqa.	Winter water canal which separates the villages of Jounieh and Basbaʿal.	River of Abū ʿAlī.
11	One-third of the mazraʿa known as Qalʿat al-Ḥamrā' in muqāṭaʿat al-Futūḥ which contains the same type of items as (#10) above.	Land part of the waqf of Sayyidat al-Anshīf; waqf dayr Sayyidat al-Ḥaqlah; milk of the sons of Abū Ghanṭūs Bāsīl, Doumiṭ ʿĀṣī Raʿd, and Ṭannūs al-Ghadrāsī.	Milk Buṭrus al-Aṣfar and Ṭannūs Bākhos and Ilyās al-Muʿarkij from the village of Ghazīr; and the Shaykhs sons of Naoufal al-Khāzin.	Milk of the pastor (*khūrī*) Janāriyus Karam and his nephews Ḥannā and Jubrā'īl; land part of the waqf of Sayyidat al-Anshīf.	Milk Murʿib Raʿd and the sons of Bāz al-Munāqaṣa; milk Najm Murād; milk of the Shaykhs sons of Ṭalab Ḥubaysh; road; milk of the Shaykhs sons of Ṭannūs Ḥubaysh.
12	One-third of the olive-yard (karm) located in a place known as Ẓahr al-Anshīf, in association (*sharika*) with the Emirs Ḥasan and Munqidh.	Waqf of the church of Mār Mikhāyil.	Waqf Sayyidat al-Ḥaqla.	Milk of the sons of Ibrāhīm Abū ʿAql from the village of aj-Jadīdah.	Milk Yūsuf Abū Ṣaʿb from Kufūr; milk Louis Makhlūf Ziyāda from Jadīdah.
13	One-third in association (*shā'iʿ*) with Emirs Ḥasan and Munqidh of the piece of land known as the Mīdān in the village of Ghazīr in Jabal Kisruwān.				

Table 5-4: 3/3

Table 5-5
Properties of Ḥulā Shihāb (allegedly purchased from her husband, June 17, 1855) (C 5-2)

#	Property	North	South	East	West
1[98]	Land with olive trees (*karm zaytūn*) located in the Shuwayfāt desert in the place known as al-Dakhīra.	Milk of Lady Shihāb, mother of Emir ʿAbbās.	Milk Nāṣīf Abū Ghānim.	Milk Ḥājj Muṣtafa Bayhum; and milk Lady Shihāb, mother of Emir ʿAbbās.	Milk Nāṣīf Abū Ghānim and the aforementioned Lady Shihāb.
2	*Karm zaytūn* in a location known as Rubāʿ Qayqab.	Road.	Milk Emir Ḥaydar Arslān; and milk Sharaf-ud-Dīn Abū Naʿīm.	Road.	Milk Saʿīd Bek Junblāṭ; and milk Nāṣīf al-Bardawīl.
3[99]	*Karm zaytūn* in the Shuwayfāt desert in the location known as Sahl Shāhīn.	Milk Shāhīn al-Rīshānī.	Milk Ḥājj ʿAbdullah and his brother ʿUmar Bayhum.	Milk Shāhīn al-Rīshānī.	Milk Lady Shihāb, mother of Emir Rashīd
4	*Karm zaytūn* in the same location as (#3) above.	Land belonging to the waqf of al-Yalka church.	Milk Banū Bayhum.	Milk Lady Shihāb, mother of Emir Rashīd.	Milk Manṣūr b. Shāhīn ʿAbdullah.
5	*ʿAoudah* located outside Beirut in the locality known as Taḥwīṭat al-Nahr and containing mulberry trees.	Milk Isḥāq Thābit; and water canal.	Milk Emir Munqidh Shihāb, brother of the seller.	Milk Isḥāq Thābit.	Milk Isḥāq Thābit; and water canal.
6	House located within *ḥawsh al-taḥwīṭa,* south.	Milk Isḥāq Thābit and Ḥabīb Saḥḥāb.	Mushāʿ al-ḥawsh.	Milk Emir Salīm, brother of the seller (defendant).	Milk Emir Munqidh, brother of the seller.
7	House located same as (#6), east.	Milk Muṭrān Ṭūbiyā ʿAoun.	Milk Emir Rashīd Shihāb.	Milk Muṭrān Ṭūbiyā ʿAoun.	Mushāʿ al-ḥawsh.
8	ʿAoudah located in the same *taḥwīṭa* (Table 5-4, #4) containing mulberry trees, among others.	River	Milk Farḥāt al-ʿĀzūrī	Winter water canal	Road
9	House located same as (#6), south.	Mushāʿ al-ḥawsh.	Milk of the sons of Ṣāleḥ al-Shaʿʿār.	Milk Muṭrān Ṭūbiyā ʿAoun.	Milk Emir Salīm.
10	House located same as (#9).	Mushāʿ al-ḥawsh.	Milk of the sons of Ṣāleḥ al-Shaʿʿār.	Milk Emir Rashīd Shihāb.	Milk Lady Saʿda, daughter of Bashīr II.

Table 5-5: 1/2

98. Seems identical with the second property of Saʿda Shihāb (Table 5-4, #2) except for "place known as" (*al-maʿrūf bi*).
99. The only property claimed by Ḥusn Jīhān.

#	Property	North	South	East	West
11	Twelve qīrāṭs from the pine-tree forest located outside of the *taḥwīṭa,* in association (*sharika*) with the Emirs sons of Khalīl and Rashīd Shihāb and the Muṭrān Ṭubiyā ʻAoun.	Milk Emir ʻAbdullah Qāsim Shihāb.	Milk Emir ʻAbdullah Qāsim Shihāb.	Milk Emir ʻAbdullah Qāsim Shihāb.	Road.
12a[100]	Four qīrāṭs of the aforementioned shops (in Jounieh, Table 5-4, #9a) known as Dakākīn al-Qanṭara, in association for the other half with Shaykh Ilyās al-Daḥdāḥ, while the remaining part is *shā'i'* ("common property"?).				
12b	Four qīrāṭs of the shops and wharehouses and front courtyard (*'arṣa*); same location as (#12a); in association for the other half with Shaykh Qāṣū Khāzin, while the remaining part is *shā'i'*.				
12c	Four qīrāṭs of the shops, warehouses, and bakery in the same location as (#12a); in association for the remaining share with the sons of Shaykh Haykal al-Khāzin.				
12d	Four qīrāṭs in the farm known as mazraʻat Kafarnaḥsha located in muqāṭaʻat al-Zāwiya.				
12e	Eight qīrāṭs in the farm known as Qalʻat al-Ḥamrā' containing non-cultivated lands and other lands with plantations, vineyards, etc.				
12f	Vineyard located in a place known as Ẓahr al-Anshīf.				

Table 5-5: 2/2

100. Beginning with this point, all properties are identified in terms of a single location each.

Unchallenged narratives

My reading of both cases has been shaped by the assumptions outlined at the beginning of this chapter and throughout this study. A reading of the document-as-totality has led to the following provisional conclusions and observations. First, the debt-procedure that was raised at the beginning of the document of the estate of Bashīr II (C 5-1) signals the "friendly" aspect of the litigation (even though the order of reading must be revered to fully understand the debt-procedure). Second, the transfer of a large estate to a woman outside the patriline was a significant and unusual step, even though, legally speaking, all procedures followed the normal routine and involved nothing exceptional. Third, such a transfer would not have been possible without the approval of the qāḍī, an approval that rested, in the final analysis, upon the testimonies of two witnesses provided by the defense, Ḥusn Jīhān, who was the mother of the plaintiff. Accordingly, this friendly-fictitious litigation demonstrates how social actors used the court system to re-negotiate their status and position in society: Following the political demise of the Shihābs, a mother and her daughter who were only tenuously linked to the clan were able to transfer a large estate to their own patrimony.

The second case of Sa'da and Ḥulā Shihāb (C 5-2) leads to similar conclusions, albeit its structure is quite different from the previous one. Divided into two parts, only the first bears some resemblance to that of Bashīr II. In fact, both involved massive property transfers from husbands to wives (in the case of Bashīr II, the husband was already dead, but the transfer took place with his daughter as "medium"). In both, the "winner" was the party that was able to furnish evidence through witnessing, while the narrative of the opposing party—the "loser"—was usually the richest in terms of details and also the most conscientious in providing a historical background to the "litigation." Ironically, then, the less one talks, the better, and the more "data" one provides the greater is the likelihood to lose the case—and one's properties! Fictitious litigations, however, have narrative rules of their own very different from genuine ones (see Chapters 7 & 8 *infra*). For one, they never contain fatwās; the veracity of the witnesses' claims are also never challenged; and, most importantly, one of the parties—it doesn't matter which, plaintiff or defendant—must construct a narrative that fully traces the trajectory of all disputed properties. That final aspect is definitely the most essential because it explains on its own the existence of all that "data" regarding the status of the disputed properties, and all the individuals that owned them at some point, complete with a list of the properties. But, on the other side, such claims are seldom disputed on a point-by-point basis, as a genuine litigation would normally proceed. They are rather *globally* rejected, sometimes with

a global counter-narrative that does not even address the detailed aspects of the first; or, better, the original narrative is denied, the judge then requests for evidence, and two witnesses are brought to establish that those properties are "mine." Why then bother with all the details? To my mind, the most essential aspect of narratives that construct fictitious litigations is that they are stated with all their small details, and twists and turns, so as to be eventually ruled out. In fact, if we accept that fictitious litigations are nothing but simulated contractual settlements, it is essential that the ruling also eliminates alternative narratives that might be used in the future while attempting to win over one of the properties. It is as if such elaborated narratives are not even addressed to the opposite party so as to be challenged and debated by careful examination, but are rather meant to be integrated and objectified in the text itself—a text that reproduces the authority of the judge. In short, such narratives are indeed meant to address any potential "reader" which might share an interest in those same properties so as to discourage her from using those same arguments all over again.

Ottoman Ḥanafī jurists were concerned with the notion of a "valid lawsuit" which in principle should be a combination of a sound litigation, evidence, and a fair ruling, but, above all, all of them combined should constitute an "event," *ḥāditha,* "so as to make a ruling embedded in an event."[101] Thus, all valid rulings should in principle become events (*yaṣīru al-ḥukm ḥāditha)*, but not all fatwās become events—only those that were prompted by an event become themselves events (*hādithat al-fatwā,* or *wāqi'at al-fatwā*), while the rest are simply hypothetical fatwās. The point here is that the process of adjudication should only be the outcome of events that would urge for a ruling, only then the ruling itself would become an event—hence consecrate something unique and never seen before. To be sure, all those notions only achieve their meaning within the *tarātub* of the *madhhab,* so that a judge can only adjudicate within the limits imposed by his own school. "Valid," however, is different from what I mean by "genuine." A genuine litigation must be also valid, while a valid litigation could be fictitious. In fact, all the cases analyzed in this study are perfectly valid from the point of view of the fiqh—otherwise they would have been revoked and probably not even included in the *sijill*s—but some I found to be "fictitious." Thus, a valid litigation is only *formally* genuine, as the disputants themselves claim, but could turn out, upon closer examination, to be fictitious. The point is that fictitious litigations had become so much routinized and well embedded within the procedures of the courts that it would have been unthinkable for jurists to declare them illegal—but,

101. Ibn Nujaym, *Rasā'il,* 358.

except in few cases,[102] they never dared to overtly explicate their procedures. At times, though, some of those "illicit" practices had to be reprobated, even if it remains uncertain—considering how widespread fictitious litigations were—what was it exactly that was subjected to condemnation. Thus, in a passage quoted earlier but which is worthy of a fresh look in light of the cases analyzed thus far (and the ones to come), Ibn ʿĀbidīn warns, regarding litigations, that "whenever a judge knows beforehand that the *bāṭin* of a matter does not conform to its *ẓāhir,* and that there is neither litigation nor dispute on the same matter between the disputants, he should then not listen to this suit since adjudication does not apply in this case, and because one should explore the possibility of subterfuges for the sake of a ruling."[103] What kinds of lawsuits were condemned in such—rare—passages? Clearly, in the cases I describe as "fictitious litigations," the "external claims [*ẓāhir*]" introduced by the disputants and their representatives do not match with the "essence" of the case—its *bāṭin,* what it stands for. But in the extreme brevity of his comment, Ibn ʿĀbidīn leaves us uncertain as to the type of cases he was referring to.

Any researcher who attempts to transcend the specificity of a particular document must confront the issue of how many cases would constitute a representative inventory of the court records. Faced with a similar problem when analyzing myths, Lévi-Strauss noted in the "Overture" to his four-volume *Mythologiques,* "Experience proves that a linguist can work out the grammar of a given language from a remarkably small number of sentences, compared to all those he might in theory have collected (not to mention those he cannot be acquainted with because they were uttered before he started on his task, or outside his presence, or will be uttered at some later date." He concludes, "What I have tried to give is an outline of the syntax of South American mythology."[104] The key word here is "syntax," which signifies the manner in which South American myths are constructed, their internal logic, and thought processes. Whereas the number of myths is infinite and limitless, their syntax, like the grammar of a language, is limited to a certain number of rules (about which the natives are unaware) that the ethnologist attempts to reconstruct. In a similar manner, my primary objective is to discover the syntax of the sharīʿa court documents which, by definition, is limited. To this end, I have analyzed the debt-procedure mentioned at the beginning of the Bashīr II case in terms of a structure that follows a logic connected to the rest of the document-as-text. Both the "debt" (C 5-1 & 6-1) and the underlying structure

102. Such as Qāḍīkhān's fatwā on how to insure that a waqf is irrevocable, see Chapter 6, C 6-2.

103. Ibn ʿĀbidīn, *Radd,* 5:354.

104. Claude Lévi-Strauss, *Mythologiques. Volume One: The Raw and the Cooked* (Chicago: University of Chicago Press, 1969), 7-8.

of "occupation" and "unlawful usurpation" were routinely acknowledged as procedural fictions. Although each case possesses its own distinctive features, the "debt" follows the same syntax and serves a similar purpose. More important is the structure of the narratives, which in the case of fictitious litigations were all "unchallenged." Either the plaintiff or defendant would normally proceed with a long and tedious exposition of the history of the alleged "conflict," thus exposing the bulk of the factual data for a case; but then the painfully narrated claims are not subject to the scrutiny of the other party, and are rather rejected in toto on the ground that two witnesses were able to testify that their party had "purchased" or "occupied" the disputed property since a specific date. The structure of such narratives, in conjunction with what Ḥanafī practice imposes, are the two most essential aspects of text analysis and interpretation.

What—if anything—does the syntax of the documents tell us about the practice of the courts? Psychoanalysis teaches that there is a gap between the symbolic universe that the subject constructs for himself and the real world. A similar gap exists between the symbolic universe of the courts and their language, on the one hand, and their praxis, on the other. The universe of the courts is that of a linguistic (social) construction. The courts create a syntax of their own that names things, defines relationships, and classifies categories. We thus speak of "property," "debt," "inheritance," and "waqf," as if they are realities. In fact, these nouns represent a far more complex set of symbolic abstractions. This division between the symbolic and the real is manifested in the role of the qāḍī who, on a daily basis, is confronted with the task of transforming the symbolic into the real, thereby according him a measure of "freedom." In the case of the estate of Bashīr II, the qāḍī in a purely routinized decision played a crucial role in facilitating the transfer of property outside the Shihābs (a decision that would have been unthinkable when the Shihābs had full political power). The irony is that the process whereby the qāḍī arrived at his final decision is poorly documented in the sharī'a court records, hidden in a dark zone, like death, about which we can only speculate.

Chapter 6

Waqfs as contractual settlements: The transfer of property to women II

Thus far, our investigations into the theory of contract led us into several conflicting trajectories. In the chapter on contracts (Chapter 3 *supra*), we have explored how the late jurists were at odds in presenting a coherent theory of contracts, and even though such an incoherence is common to many systems, part of the problem lies in the uniqueness of the Ottoman period and the difficulties encountered by jurists to acknowledge the validity of newly established contractual forms, in particular those that did bypass the notion of an equal and simultaneous exchange. Thus, newly established contractual forms such as the *marṣad,* sharecropping contracts, the *khulū* and *gedik,* were accepted by jurists on a de facto basis: not only did they hardly fit in the logic of the fiqh, but they were not easy to categorize, and their logic was tied to newly established customary practices in conjunction with low rents and high iltizām dues. Jurists did not find it appropriate to work a substantively new law of contracts for what they perceived as political aberrations of their own period, which granted multazims and their protectors unduly powers. But the fiqh manuals kept the debate, even for the newly established contractual forms, at the prescriptive level (and the bulk of contemporary legal historical research is trapped in the same way). In fact, what those texts were unable to account for and fully describe were the practices that emerged in the courts in the form of fictitious litigations. To be sure, even though the latter cannot be all subsumed into a single category (see *supra* the table on procedural fictions, Table 2-2), they nevertheless reveal an unusual combination of debt as *dayn,* hence implying a sort of primitive debt-contract and obligation, on the one hand, and the transfer of property as *'ayn,* on the other. Fictitious litigations were therefore nothing but simulated conveyances, and, in this role at least, they attempted to bypass the limitations of the canonical contract. This chapter would like to bring waqfs into the broader picture of all the contractual settlements discussed thus far, and question whether that form

of "private property," by tying several generations of beneficiaries together, created a contractual formula of its own that was similar in some respects to the ones discussed earlier (Chapters 3 & 5 *supra*).

The economics of waqfs

Considering that the primary aim of the state was to ensure the implementation of its mīrī system, which at its core was a hegemonic rent-control formula, what was behind its "interference" in the waqf system? Even though jurists tend to date the origins of waqfs to the time of the Prophet, the system that the Ottomans had inherited from the Mamlūks probably goes back to what Marshall Hodgson had labeled as the "Shī'ī century" (945-1118), when, in the Seljūq period, the custom of putting landholdings into waqfs so as not to subject them to government seizure became common. In other words, it was under the rule of the small militarized bureaucracies, and the *a'yān-amīr*s system, that waqfs had flourished. In fact, waqfs, together with sharī'a law and ṣūfī orders, had become the sole domain of the *a'yān* and *'ulamā'* as a protective shell against the excessive militarization of public and urban life and landholdings. But it was under the Mongols, and later the Mamlūks, that courtly control of waqf endowments became the norm. Besides attempting closer links with the *'ulamā',* what was the economic significance of such an approach? With the peasantry being trapped in corvée labor, and the value of rent for both *milk* and waqfs in disarray, courtly control over a domain that kept the *a'yān-'ulamā'* factions quasi-autonomous would only create a balance between state *iqṭā'* and the waqfs, whether public or private. And the Ottomans were no different: "by the end of the 16th century the state had taken almost total control of the field of waqf."[1] It was indeed that imbalance, due to the excessive assignments in landholdings, between various types of rents, that gave the imperial state a golden opportunity to intervene. That investment in public waqfs, however, seems to have lessened throughout the 18th and 19th centuries, while the traditional grip that the *'ulamā'* maintained over the sharī'a courts persevered, and the dismal rents only contributed towards more procedural fictions in the courts (*marṣad,* long leases, dismemberment techniques, etc.), some of which were analyzed in Chapters 3 and 5.

1. Richard van Leeuwen, *Waqfs and Urban Structures: The Case of Ottoman Damascus* (Leiden: Brill, 1999), 117. It is a gross error to conceptualize the language of the sharī'a courts, as van Leeuwen does, as a discourse of the state (p. 153). But they are not anti-state either: a centralization of the court system would have implied far more sophisticated and costlier methods of domination than those deployed by the Ottomans.

Waqfs are typically presented either as a way to protect and consolidate private property from abuses perpetrated by the state, or else as a form of private property all by itself.[2] In either case, the emphasis is on the status of the property per se rather than on the *process* that makes such arrangements possible. In the concluding section of Chapter 4, I argued that due to the difficulties in acquiring, maintaining, and transferring property, on the one hand, and in bypassing the rigidity behind the mīrī, waqf, and milk division, on the other, the emphasis was on *contractual settlements* rather than the acquisition of property per se. It was indeed such arrangements that made possible the "possession" and "use" of very diverse properties for specific purposes and for limited periods, all of which would have been impossible had the requirement first been a specific title to the property itself.

Because in such societies the freedom of exchange was very constrained, contractual settlements acted as a leeway to bypass such harsh limitations. To begin with, land and labor were both forms of capital, but since land was either mostly controlled by the state, or frozen into waqf assets, its free transfer was by and large blocked (interest loans were much higher than land revenues). The impositions on the transfer of land and its free circulation ipso facto translated to freedom of rent. In fact, even in urban areas, leasing a property for personal use implied above all paying a high advance to the ex-tenant as "compensation" for freeing the property. Finally, with corvée labor being the dominant type (which was cheaper than slavery), and whose value cannot be assessed in terms of a market price, farmers with a professional background were unable to go for free contractual arrangements either with landowners or other farmers, and opted instead for special sharecropping arrangements which typically gave them a higher portion of the produce than would have been the case under normal conditions. Similarly, the guilds controlled urban (or rural) labor by keeping a *numerus clausus* on their members, and by keeping production lower than demand as a leeway for controlling inflation and prices. Free laborers, not covered by the guild system worked on an equivalent of sharecropping contracts such as the *istiṣnā',* where a premium was paid first in the form of raw-materials.

The point here is that there was very little capital invested in acquiring the property itself, while the bulk of the costs went for working out the contractual settlements for using the properties. Such an arrangement not only prohibited free exchange, but also protected the domination of the imperial state, on the one hand, and the integrity of kin relations, networks, and neighborhoods,

2. Ghazzal, *L'économie,* Chapter 5: "Le waqf comme forme de propriété privée."

on the other. Waqfs should therefore be primarily looked upon as contractual settlements, which implies the following assumptions.

1. Waqfs typically consisted of a portfolio of properties, which *in principle* should have been originally privately owned, but whose de facto ownership was much broader than milk, and might have included mīrī lands as well, or even older waqfs that have been reshuffled into newer ones. It is not therefore inaccurate to describe at least some of the acts of waqfs (*waqfiyya,* or *kitāb al-waqf*) as "wills" (*waṣiyya*), if not legally, then at least metaphorically in the eyes of their beholders. In fact, some of those acts were drafted when the founder was still at a very young age, but the waqf itself was enacted only years if not decades later, and sometimes even after the death of the founder. Such an arrangement could prove useful, especially if the founder was responsible for the management of his or her family properties, and if he or she was at the head of a community: the waqf, acting as a quasi-will, would then bring together the properties of the family, divert some of the revenues to common purposes (including the household itself, whose space often acted as a patriarchal *lieu de rassemblement*), and bolster the waqf with additional properties whenever necessary. Such was the case of the waqf (described as "will") of Shaykh Bashīr Junblāṭ (1775-1825) who was the main supporter, on the Druze side, to Bashīr II, then became his foe, only to be executed by the governor of Acre in 1825. Having built the Mukhtāra palace in Druze territory, he healed a divided community together to accept the leadership of Bashīr II in central Lebanon (who, in turn, had massacred many of his opponents and cousins to bring stability to his rule). He drafted his waqf-cum-will in a Damascus court in 1808 when he was only thirty-three, but it was only effectively enacted (or executed) in 1866 when the beneficiaries deposited a request to the Grand Council of Mount Lebanon to execute (*tanfīdh*) the founder's will.[3]

2. Such properties were not necessarily contiguous, and in most cases they were not, as they included an amalgam of rural and urban properties without much relation to one another, except their existence within one portfolio under a single administration.

3. The act of the waqf itself, or the *waqfiyya,* was the contractual settlement that brought all the beneficiaries together, and was originally established by the founder. As it was extremely hard to change the stipulations of the waqfiyya upon the death of the founder (but generally permissible if he or she was still alive), the contract should in principle bring together future

3. Anīs Yaḥyā, *al-Shaykh Bashīr Junblāṭ wa-taḥqīq waṣiyyatu-hu, 1775-1825* (Beirut: Dār al-Funūn, 2001).

generations of beneficiaries. On the other side of the contractual settlement were the various tenancy contracts that the administration had to work out with individual tenants, whose number obviously varied with the varieties of blocked properties. But if the original contractual settlement among beneficiaries must have in principle remained permanent, the other contracts were to be negotiated with each individual tenant separately.

4. The important point here is to see how those individual tenants legally behaved vis-à-vis the waqf (and vice versa). The sharī'a court records point to many litigations between the tenants and administrators (a sample of which was introduced in Chapter 3), where the tenant always faced the waqf *in the person of its administrator rather than as an autonomous legal entity of its own.* In other words, the waqf did not dissociate as a "juristic personality" or corporation on its own and was not treated in court as an institutional endowment with separate rights. It was rather the administrator who *represented* the waqf's beneficiaries, and as a representative he or she simply followed the same contractual obligations that normally bind two parties together. Hence the administrator-representative was no different from other representatives commonly found in the courts' proceedings. Had the waqf evolved into a corporation, it would have operated within a separation between the interests of its members and those of the institution. Thus, and despite some fictions that were common only to waqfs (e.g., the *marṣad*), the waqf lawsuits were no different from the mainstream, and besides the broad rule that "the *'ayn* is blocked and is not the property of anyone anymore, while the *manfa'a* is the beneficiaries' right," there is not much that is specific to waqfs since all was geared towards stopping unlawful contracts.

5. From a legal point of view therefore, each one of the waqf's properties was a unit on its own, and treated as such in court, while litigations were kept on a person-to-person basis. Thus, broadly speaking, waqf litigations followed the general procedures of tenancy contracts, but with the founder's intentions in mind. The difference, however, must have been from the administration's side, which did manage every portfolio as a comprehensive unit with its own bookkeeping activity. Such arrangements were helpful because a losing property on one side would have been compensated by a more prosperous one. In fact, a list of a waqf's properties (for example, Table 6-1 *infra*), besides pointing to all the tenancy contracts at a glance, shows the great diversity in terms of location and nature of the properties. But such diversity would suffer from its own pitfalls in particular if the administration proves incompetent in handling such a heterogeneous body of properties.

6. What were then the advantages of placing all those properties together under a single regime? And besides the obvious advantages in status, rank, and prestige, which benefited an individual or family, what were the

economic advantages? We already noted, as a general rule, that contractual settlements became a key component within the legal system to bypass the rigidity of property law, but waqfs, however, did add another dimension to such arrangements, mainly in their ability *to minimize transaction costs over reasonably long periods of time*. To begin with, the various tenancy contracts that the waqf had to work out with its numerous tenants were subjected to the same rules and regulations as any tenancy contract. The cost of negotiating and bargaining such contracts, which was always on a one-to-one basis, was therefore no different from other individualized contacts of a similar nature, but were not part of a waqf compound. However, the cost-saving device took place in effect at the level of the contractual settlement imposed on all the beneficiaries by the founder: for every group of beneficiaries there was an arrangement that had to be respected, while the modalities of the waqf compound were to remain unchanged—and herein resided precisely the cost-saving device, considering that it was unlawful to renegotiate the modalities of the contract among beneficiaries.

7. However, it remains uncertain how much in the final analysis waqfs were beneficial in the long run either for the beneficiaries and their family, or for the economy of the city or region in question. In fact, since the system consisted in blocking a number of properties from circulation indefinitely (at least in principle), already by the second generation of beneficiaries the revenues dwindled considerably, and the administrators had to begin searching for alternatives. In effect, since the whole waqf system rested for the most part on individualized tenancy contracts, those were, like all contracts of the same type, fettered by all kinds of limitations and were thus not bargained freely on the market; moreover, tenants always managed longer rents and forms of investments that gave them a leverage over the property as such (see Chapter 3 *supra*). In short, however reasonable the rate of inflation might have been, already the second generation of beneficiaries found itself in a situation where the real value of the rents were far below those accumulated by the first generation. Moreover, all those properties, which provided cheap rents for the populace, were blocked from circulation. It thus became a system, in parallel to the mīrī, over which contractual settlements had to be indefinitely worked out precisely because free exchange was not permitted.

8. Finally, it should be noted that being parallel to the mīrī system and subordinated to its hegemony, waqfs have suffered from the low rents imposed by the latter. In fact, and even though the "private" nature of waqfs and their type of produce (usually plantations and the like, while mīrī lands were constricted to grains) protected them from the abuses commonly found in state-owned lands, their rural properties tended to be leased to tenant farmers, thus pointing to a non-corvée kind of arrangement (see Table 6-1

infra as an example of this pattern). Still, the rent system was not competitive enough since it was dominated by the hegemonic mīrī, on the one hand, and a weak law of property, on the other. Thus, as contractual settlements were the normal route to define property rights, waqfs managed their existence by surviving in terms of arrangements that placed various non-related properties under a single administration. That could well have been the secret behind the institutionalization of waqfs: namely, that they were a means to absorb the low-rent hegemony imposed by the practices of the state.

Validating waqfs through routinized procedural fictions

In our last Shihābī case (C 5-2), we encountered in the context of a fictitious litigation an example of a large transfer of properties within the same family. A paradox presented itself: even though the customary laws of Maronites prevented men from transferring property to women—in particular non-married or widowed women (including nuns)—women, at least as witnessed by those wealthy families in decline, acted as the safeguards for the transfer and conservation of large estates. Thus, even though our texts contained all manner of prescriptions against the inheritance by women, some cases ended up with a ruling that gave a particular woman the rights of full ownership (or the administration of a waqf, see C 6-1 *infra*). To be sure, such attitudes did have strong societal implications, but they hardly reveal anything of value from a legal perspective: those were for the most part procedural matters that did not involve genuine litigations, so that the *legal* role of women was minimal, in particular that such procedural fictions were obviously not restricted to women. In short, our cases, even when women "won" their case, do not point to any newly enhanced status of women within the court system, or in society at large for that matter: those were mostly procedural fictions where women acted as safe agents of transfer by acquiring a title to real property, and such acquisitions tended to reproduce the status of the upper classes. In fact, a key element in understanding such cases is the notion of "occupation," *waḍ' yad,* of a disputed property. As we noted earlier in our discussion on land-tenure (Chapter 4 *supra*), Ḥanafīs accepted a de facto acquisition of title to real property by possession (*waḍ' yad:* "occupation"), but it neither specified a statutory period nor established the conditions. Had it done so, the method of acquisition would have been close to that of "adverse possession" in common law. But in the absence of a statutorily prescribed period and in a method to establish title (such as proof of nonpermissive use), it was left to the courts to work out the procedures, which either involved genuine litigations of nonpermissive and illegal use (see Chapter 7 *infra*), or,

like many cases encountered thus far, fictitious litigations. In the latter, the plaintiff complained of unauthorized use, only to have the defendant winning her case on the basis that she had only possessed and used a property that was hers in the first place.

In the two cases presented in the previous chapter, the adverse claimant who was in actual possession of the property was either defendant (C 5-1) or plaintiff (C 5-2). But in either case, the purpose was to restore ownership to the opposing party. In other words, there was always a side accused of hostile possession and, in fictitious litigations, that side lost the battle. Since all those cases simply restored titles of ownership within the family, was there any other way that such entitlements might have taken place? Apparently not, considering in particular the "fluidity" of possession over mīrī lands and the vagueness of Ḥanafī practice as to what separates possession from actual ownership. In fact, had there been precise statutes as to the prescribed period of possession and the like, the courts would have been flooded with cases of "constructive adverse possession" in which the claimants would have proven their possession of the property and their payment of taxes and rent over a period of time (limited by statute). But in the absence of such a method for claiming ownership, the courts were left with procedures of their own, ones that would typically begin with a debt conflict (though not always) through a concealment of the friendly nature of the litigation, with the sole intention of validating ownership. The waqf case that will be examined below, despite some basic differences between milk and waqf, nevertheless shares an essential part of the procedures that we have already seen.

[C 6-1] The waqf of Bashīr III[4] is divided into two separate and consecutive cases, located in the same Beirut register, with the same date (20 Ramaḍān 1268/8 July 1852),[5] with the same two parties, and their representatives and witnesses; and both were concluded with identical rulings: Why were then the two cases separately presented in court? The different sets of properties that each case included is an indication that those sets were the heart of the matter and hence had to be dealt with separately (Tables 6-1 & 6-2 *infra*); beyond that, there is no need to worry much, at this stage, as to why a litigation over a *single* waqf had to be brought to court in two separate, identical, and consecutive cases.

The plaintiff, Bashīr III, was represented by Shaykh Yūsuf b. Anṭuwān Ghāzān al-Khāzin from the village of Ghasṭah; the defendant, Bashīr III's wife, Ammūn bt. Emir Manṣūr Qāyid Beh Billama', had Yūsuf b. Mubārak Ghanṭūs

4. Ruled for only a year in 1841, after his cousin Bashīr II was sent to exile. The turning point was obviously the end of the Egyptian occupation in 1840.

5. Beirut sharī'a courts, unnumbered register and page numbers, 8 July 1852.

al-Khūrī from Bakāsīn in *muqāṭa'at* Jizzīn (in the Shūf) as representative. It was typical that whenever the defendant kept all the disputed properties for herself, she would share more of the burden of proof, and thus have the identity of her representative doubly checked. This was done, first, through a pair of witnesses, in this case from villages and farms south of Beirut (where the properties were located), which confirmed the authenticity of the act of representation. But apparently that was not enough (since, for example, someone with an interest in the waqf could come years or decades later and reject the representation altogether by bringing two other witnesses), a legal trick was needed to confirm, once more but more thoroughly, the identity of the representative and his exclusive contractual rights for representing his client. Hence the "debt"-claim made by the plaintiff's representative to the other party's representative.

> You owe his excellency, the husband of your client, the aforementioned Emir Bashīr, the sum of ten piasters as a legal debt [*dayn shar'ī*] and it is now time to refund it [*ḥāla al-ajal*]; he asked me to collect it from you, to request it, to litigate, and do whatever necessary.

Interestingly, as in all previous cases that involved a debt from their very beginnings (C 3-3 & 5-1), the debt institutes a contract of sale between the two parties, in which the debtor owes in his *dhimma* a sum to his creditor to be refunded at a specific date. Ḥanafīs do not require any written document for that type of a transaction (and our cases never did include one), and a loan-with-interest being illegal, our cases never added an interest to the debt in question. That entailed, however, that a refund date be established *ab initio* with the contract, and the implication in the above quote is that the moment of refund coincides with the date of the hearing itself. In Roman law such a contract, which created a type of creditor/debtor relationship (known as *pignus*), was "real" because it was derived from the Latin word for "thing," *res*. In our case here too, the contract was concluded over a "thing"—the ten piasters, in itself a *māl mutaqawwam*. But besides establishing the representative's identity and his right to represent his client and litigate, and besides a possible anthropological reading of such transactions (as gifts and counter-gifts), was there any other benefit in having a debt-contract right at the beginning of a waqf case? If we agree that the waqf litigation in the second part was fictitious and nothing but a simulated conveyance, then the case itself probably sealed a contractual settlement between plaintiff and defendant involving a transfer of property-titles. The defendant's representative, being already involved in a contractual arrangement with the plaintiff, will be the one to seal another contract between plaintiff and defendant, one that will give the latter many titles over the plaintiff's properties. That arrangement could be a device to set the final contract on more secure grounds.

The subject of the "debt" is then forgotten at this point, and, in a step that would look surprising to the uninitiated, the text moves immediately to the unrelated topos of the waqf of Bashīr III and its list of properties, and then to the conditions put forward by the bequeather on his endowment, and finally to the fact that the bequeather, who had appointed his wife to the status of the waqf's administrator, would like to revoke that part of the waqf's policies. Up to this point, it was still the plaintiff's representative forcing his claim (which occupies the greater part of the document), while the "debt" issue comes back only towards the end of the document once the plaintiff's representative claims were fully completed.

> Yūsuf Mubārak, the defendant's representative, was asked to reply [to the plaintiff's claims], and upon that request, he replied that he acknowledges the legal debt [to the Emir] whose [refund] time has come; and [he also confirms] the aforementioned benefactor's waqf on the established conditions, but denying that the benefactor had ever requested from Shaykh Yūsuf to represent him [in court] ...

At this point, the plaintiff's representative furnished two witnesses that confirmed his appointment by the Emir, and the judge having accepted their testimonies, requested from the defendant's representative to refund the Emir for the original debt through his representative. The judge then proceeds with his final ruling (more on this later). The essential features of the debt-contract are revealed in the concluding passage above: first a denial of the debt, followed by its acknowledgment by two witnesses, which also implied accepting the plaintiff's representative rights; that was soon to be followed by another acknowledgment regarding "the benefactor's waqf on the established conditions." In many fictitious litigations, including homicides (Chapter 11 *infra*), it was customary for the defendant, who will eventually be the sole beneficiary of the contractual arrangement, to give his approval over the plaintiff's claims precisely because she will benefit from that contractual arrangement.

As with the previous case of Bashīr II (C 5-1), the *content* of the debt-procedure is *unrelated* to the case as a whole so that the essential purpose of the "litigation" lies elsewhere. Again, the procedural order between the substance of the case (part II) and the debt (part I) needs, for our purposes, to be reversed to understand the full implications of such procedures. Second, pending on whether a case covers a waqf, inheritance, or property transfer, there are minor differences in the way the major arguments of the "debt" are structured. As the waqf of Bashīr III shows, the debt-contract is truncated into two parts: one comes early, even before the arguments of the body of the litigation have been set, and soon after the disputants and their representatives have been introduced; then, a second part, which completes the first and serves

as its conclusion, is inserted prior to the final ruling. In a preliminary claim, the plaintiff's representative poses the existence of a debt-contract between his client of the defendant's representative only to request a refund, and only then is the "debt" is acknowledged by the other party prior to the judge's request for a rapid refund. Between the two are inserted a list of properties and the plaintiff's claims; hence the division of the debt-contract in two parts has to do with the defendant's representative waiting for his opponent to conclude his exposé to the court before himself replying. The plaintiff thus becomes *at the same time* a creditor towards the defendant's representative, *and* the founder of a waqf involved in a dispute with the defendant. In other words, the plaintiff is placed within a contractual relationship towards both the defendant and his representative, and both contracts are contested, hence the court proceedings. However, the minimal value of the debt (ten piasters) vis-à-vis the fifty or so waqf properties, places the two contracts in an uneven position. But the sole purpose of such procedures was indeed to place the defendant's representative within a contractual framework with the plaintiff: thus, plaintiff and representative already knew each other prior to the hearings, in the same way that the plaintiff also knew the defendant well enough (in this case, his wife). Considering the importance of the transaction—the defendant will be appointed sole administrator and beneficiary of her husband's waqf—one in which the representative will play a crucial intermediary role, prior knowledge between plaintiff and his opponent's representative "seals" the case on more secure grounds since it establishes the latter as a known and safe person—one that can be trusted, even by the plaintiff himself.

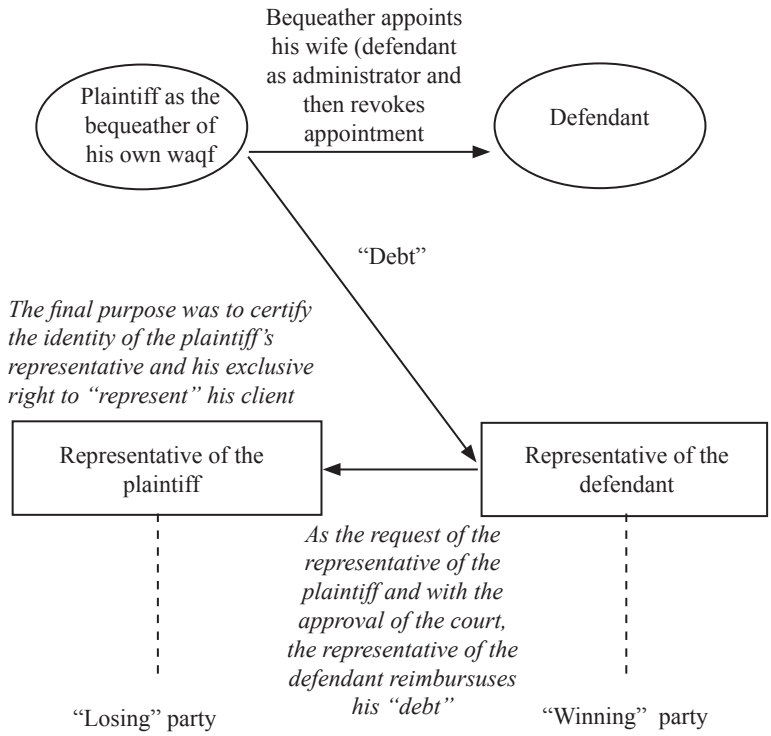
Bequeather appoints his wife (defendant as administrator and then revokes appointment
Plaintiff as the bequeather of his own waqf
Defendant
"Debt"
The final purpose was to certify the identity of the plaintiff's representative and his exclusive right to "represent" his client
Representative of the plaintiff
Representative of the defendant
As the request of the representative of the plaintiff and with the approval of the court, the representative of the defendant reimbursuses his "debt"
"Losing" party
"Winning" party

Figure 6-1. Debt-contract in waqfs (C 6-1).

Commentary: Compared to the debt-contract in Figure 5-1, the only modification here is that it was the administration of the waqf that was transferred from husband (plaintiff) to wife (defendant) rather than the properties themselves.

The debt-contract is then followed by the substance of the case, that is, the subject matter of the waqf itself, and as soon as the debt was claimed, the text proceeds with a delimitation of the waqf, its original purpose, properties, beneficiaries, conditions, and finally the defendant's case, the wife of Bashīr III, currently administrator (procurator) of the waqf, which was the sole aim of the hearings. Since a waqf, in its most obvious sense, means *detention,* we are told that the founder Bashīr III decided at some point (no exact date is specified, which could be an indication that no original waqfiyya ever existed, and that the main purpose of the present arrangement was precisely to create one: fictitious litigations could indeed replace nonexistent waqfiyyas) to put on hold, indefinitely (*waqqafa wa abbada wa ḥabasa wa khallada*), a set of properties which are all listed.

The list of properties together with their preliminary system of identifying their locations (in terms of the other properties surrounding them) is a Ḥanafī requirement. The first set of forty-five bequeathed properties (there was a

second set of six properties which were part of another consecutive case, which will be discussed later) were all located in "farms" and little villages on the southern coast of Beirut. Following the exact order of their original listing, two were in the "farm" of Ḥārat Ḥurayk, five in the "farm" of Suṭaylah, three in Bourj al-Barājinah, four in the "farms" of Khandaq Sha'bān, nine in the "desert" (and village) of Shuwayfāt, and the rest, a set of twenty-two properties, were all in the village of Ḥadath. As many of the distribution of properties of the Shihābs clearly show, the most prestigious family in Lebanese politics had invested a great deal in coastal lands, many in the vicinity of Beirut, which were essential for the production of silk.

Most of the forty-five properties (or "lands"), described as *mazra'a*s ("farms") or *aoudit* (pl. *'awād*),[6] had mulberry plantations that were used in the production of silk in Mount Lebanon. Those farms, which were owned by Bashīr III personally (otherwise their conversion into waqf would have been impossible) were mostly leased to middle-class Christian farmers, and were hence designated by the individual names of those farmers. Such a personalization of the property is an indication of the importance of middle-class farmers in Mount Lebanon and in the coastal areas between Beirut and Jūniyeh: for one, they were more sedentarized than the rest of the farmers and peasants in Greater Syria, and thus kept their leased properties for long periods (hence the identification by their names); for another, they maintained stronger relationships with their landlords and were protected by rights and privileges.

A look at the properties surrounding the ones owned by Bashīr III reveals a familiar pattern: one family, the Shihābs, owned the great majority of these lands; their ownership was, however, not in one hand but divided among brothers and sisters, husbands and wives, and cousins, all from the same clan. The other properties were mostly owned (or "leased") to (middle-class?) Christians, or even to rival Druze groups such as the Junblāṭs; but apparently in both cases, when a land was owned by a Shihāb or someone from the "outside," a pattern of keeping "kin" alliances (*ahl*) active ensued even when those relatives were from another religious group or lineage, such as the Junblāṭs. Indeed, the notion of *ahl* is flexible enough so as not to limit itself to some "pure" anthropological notion of kinship in its restricted sense of "pure blood relationships."[7] In short, the ownership and use of property

6. For the specific meaning of these terms, see infra Table 6-1: "Waqf of Bashīr III (1)."

7. Ibn Khaldūn already made the distinction between "pure" *'aṣabiyya* lineages which he referred to as "real" since they were based on actual lines of blood kinship, and the ones that were "fictitious," or *wahmī* in his own language. In the final analysis, both were equally real.

was not an openly competitive market for the free "possession" of land and its resources, but rather followed similar rules to those that determined political alliances, which in turn drew heavily on kin. The association of the distribution of land, both among the *ʻāmma,* the *muqāṭaʻjī*s, and local lineage formations, gives land historical and political connotations, whilst collective histories of submission to stronger families or lineages. Thus, hierarchical solidarity was neither achieved through a direct submission to a ruler or a local authority, but by means of complex land-distribution patterns and their respective lineages and histories of domination: even taxation assumes its share in consolidating power-relations.[8] Thus, the Shihābs, together with their "relatives" (such as the rare families with whom they inter-married and exchanged women)[9] were able to dominate, in terms of land ownership, areas with a majority of Druze and Shīʻī populations.[10] Land ownership, at least for the notable families, was therefore possible in areas not traditionally theirs, as an outcome of alliances among relatives.

Then follows a crucial passage in which the conditions (*shurūṭ*) of the waqf are outlined.

> This waqf was erected by my mandator [Bashīr III] for himself, and it shall remain so as long as he is still alive, without a partner [*mushārik*]. Then, [after his death], it will be transferred to his children, the males to the exclusion of the females [*al-zukūr duna al-ināth*]; and then to their children, and then to children of their children, and then to their descendants [*nasl*] and offspring [*ʻaqib*], always following the same rule, from one generation [*ṭabaqa*] to

8. An opposing societal arrangement would be the eighteenth-century Pacific Islands societies as presented by Marshall Sahlins, *Islands of History* (Chicago: University of Chicago Press, 1985), 51: "In Hawaii, the continuous redistribution of lands among the ruling chiefs preempts any local lineage formation, reducing genealogical memories among the common people largely to personal recollections." Kings in those heroic societies distributed defeated peoples throughout their own families in order to subdue any future struggles of their own. By mixing lineages throughout the land, the king erased any sort of bonds of kinship or ancestry. Since those bonds are dissolved, the society's coherence throughout the kingdom, or hierarchical solidarity, was easily achieved through direct submission to the king. As their families were shuffled throughout the kingdom and never individually able to assume enough power to gain the throne, people had no other choice but to submit to kingship.

9. For example, Bashīr III's wife (the defendant) was from a leading Druze family; his cousin, Bashīr II, had a second Circassian wife (so did some of his cousins). Since the Shihābs were mostly endogamic and inter-married among themselves, such rare cases of exogamic marriages could have been calculated strategies either to enhance one's status, or to avoid local alliances, hence the marriages with Circassians that were originally slave women.

10. In Table 6-1: "Waqf of Bashīr III (1)," property #10 was surrounded at both its north and west sides by the cemetery of the Shīʻīs (*matāwilah*) in Bourj al-Barājinah; yet the Shīʻīs did not own any of the listed properties.

> another, the males to the exclusion of the females in all equality [*bi-l-sawiyya*]. And then, after them [that is, after their death, or in the case of the nonexistence of male beneficiaries from the Shihābs], the revenues shall go to the poor of the Maronite branch of the grandfather of my mandator [Emir Milḥim, r. 1729-54], living in Mount Lebanon, the males to the exclusion of the females, [and the revenues should be] equally distributed [*bi-l-sawiyya*]. Then, after them, to the poor of the Maronite branch of the Shihābs [*fuqarā' āl-Shihāb al-mawārinah*] living also in Mount Lebanon, the males to the exclusion of the females, equally distributed; and then after them to the poor among the Maronites [*fuqarā' ṭā'ifat al-mawārinah*] of Mount Lebanon; and finally, to all the poor in general [*al-fuqarā' muṭlaqan*] until God inherits from the earth and its inhabitants, because He is the most prestigious of all heirs.
>
> But if my mandator has no male beneficiaries, and no children or male descendants [*ansāl*], then [the revenues] of the waqf should go to your mandator [the defendant], Lady Ammūn, already introduced to the court, for the rest of her life, on the condition that she never marries and that she remains without partner [*sharīk*] and that no one has disputed [*nāza'a*] the waqf with her.[11] And then, after her, that is, if she gets married or after her death, the waqf shall be transferred to her common daughter with the Emir Bashīr, Lady 'Alyā, and, eventually [if Bashīr and Ammūn have more daughters in common], the revenues should be equally distributed among all their daughters until the end of their lives on the sole condition that they do not marry from outside the Shihābs. And then, after their daughters, to all their children, the males to the exclusion of the females among the Maronites living in Mount Lebanon. And then to their children, the males to the exclusion of the females, and so on from one generation to the next. And then, after them to the poor of the Maronite branch of the Shihābs...[12]

At this point, the text puts forward several other possibilities that some or all of the potential beneficiaries might be faced with, even though the remaining conditions do not place the text on new grounds. Thus, when no

11. The implication here is that, in order for the waqf to be valid and for Ammūn to be its sole administrator and beneficiary, one of the conditions is that no one from the Shihābs should have disputed the validity of the waqf with her through, say, a court action. Since this was a family waqf, it was unlikely that someone from "outside" the Shihābs would have triggered a legal action of some sort; the status of non-Shihābī women whom the Shihābs married (such as the Druze Ammūn, wife of Bashīr III) varied greatly. A woman could regain the status of an "outsider" upon her husband's death, and she would thus be legally able to dispose at her own will with his inheritance, hence the harsh conditions placed on women in waqf endowments and the like.

12. At this point the document repeats the same conditions as the first part above until all the possibilities have been exhausted.

male descendants among the agnates of Ammūn and ʿAlyā are available, the legitimate beneficiaries would be any of the male descendants of the Shihābs, then the poor among them, and so on until God becomes the only designated beneficiary. The text then posits the possibility of a first generation of male beneficiaries, so that had Bashīr III any son that had died, the revenues would have gone to the children of the deceased, and, if not, to the "closest" among the "relatives" (*ahl*). The text goes over few other conditions concerning the "maintenance" of the waqf and payment of *mīrī* dues, the *māl sulṭānī,* to the fiscal authorities:[13] both maintenance charges and state "taxes" should be deducted from the gross revenues. Since Bashīr III erected the waqf first for himself—he was thus the first and only beneficiary—the revenues, as long as he was alive, were entirely his; then after his death, they should be shared among all male beneficiaries (if any). As to the administration of the waqf, it went first to Bashīr III himself, then after his death, to the most "mature" male (*al-arshad*), and if none is present, Ammūn should become the sole legitimate administrator; finally, after Ammūn and her daughter, and at any moment in time, when no male beneficiaries are present, the administration should be in the hands of the Maronite Patriarch.

All the arguments that formed the conditions of the waqf are structured along a single question: "Is there a *male* beneficiary?" Since Bashīr III had no male descendants, and was survived by his wife and daughter, the entire line of arguments on the left-hand side of the chart became *ipso facto* hypothetical—at least for two generations—since the possibility was open that, if ʿAlyā would leave with no male descendants, the waqf would go back to the Shihābs and

13. Did waqfs pay "taxes" to the fiscal authorities? This was unlikely when the waqf was *khayrī,* that is, when it was dedicated to some charitable and "public" purpose. But things were different for family waqfs designed in the first place to keep a set of properties within the family from one generation to the next. The waqf of Bashīr III was composed of a large number of rural properties that were originally privately owned (at least this is what the text admits) and then erected altogether as waqf. To the state, these waqf properties shared, from a fiscal point of view, exactly the same status as *milk* lands. As Table 6-1 shows, the great majority of the forty-five properties were "rented" by tenant-farmers who prepaid a "rent" (*ujra*) to the waqf's administrator who, in turn, paid a "tax," the *ʿushr,* to the state. The gross that the beneficiaries were entitled to thus consisted of the "rent" in toto, while the net income was the rent minus the taxes and maintenance fees. There was, of course, the possibility that other arrangements might have been worked out with the tenant-farmers such as a contract known as the *murābaʿa* where the "owner" was entitled to one-fourth of the produce as "rent." For state-owned *mīrī* lands, the distinction between "tax" and "rent" naturally collapses since the state, as the sole owner of these lands, extracted, via its multazims, all the produce from the peasantry as "rent."

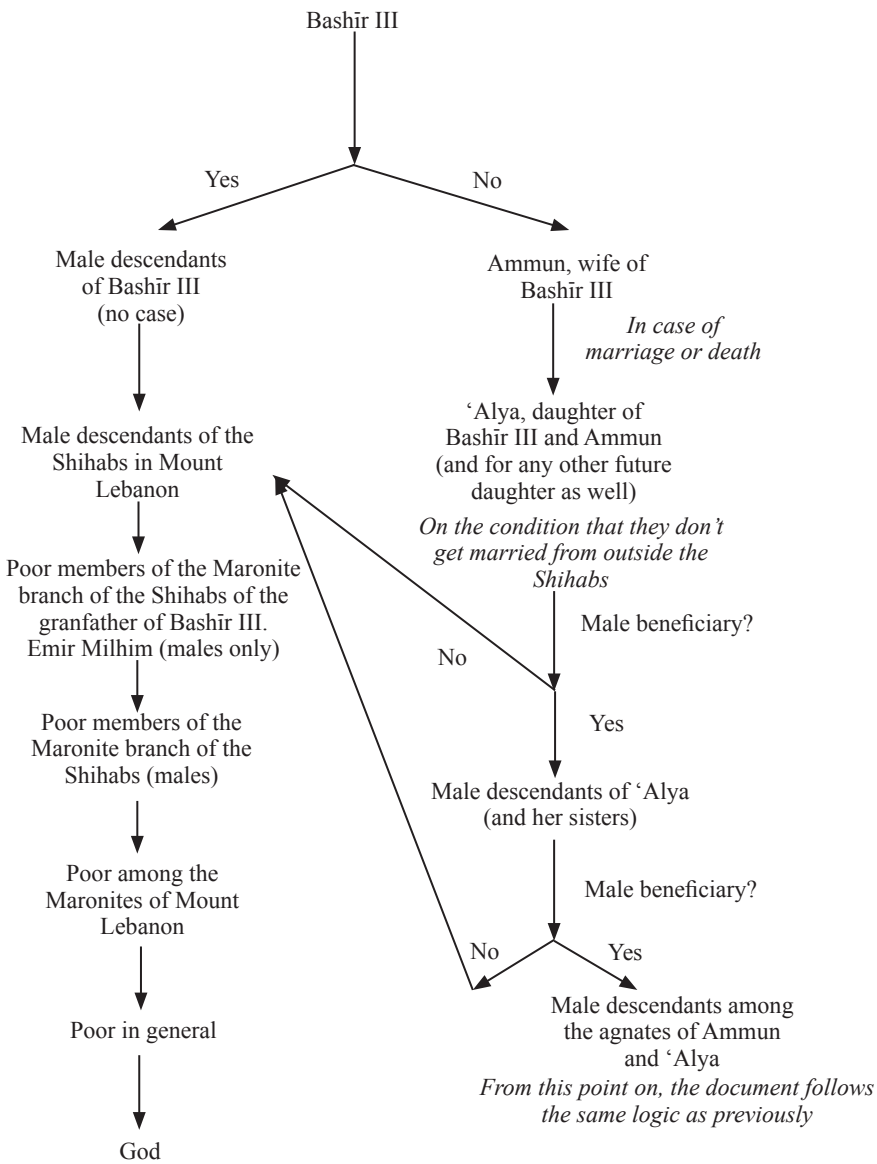
Bashīr III
Yes
No
Male descendants of Bashīr III (no case)
Ammun, wife of Bashīr III
In case of marriage or death
Male descendants of the Shihabs in Mount Lebanon
ʻAlya, daughter of Bashīr III and Ammun (and for any other future daughter as well)
On the condition that they don't get married from outside the Shihabs
Poor members of the Maronite branch of the Shihabs of the granfather of Bashīr III. Emir Milhim (males only)
Male beneficiary?
No
Yes
Poor members of the Maronite branch of the Shihabs (males)
Male descendants of ʻAlya (and her sisters)
Poor among the Maronites of Mount Lebanon
Male beneficiary?
No
Yes
Poor in general
Male descendants among the agnates of Ammun and ʻAlya
From this point on, the document follows the same logic as previously
God

Figure 6-2. Waqf of Bashīr III (C 6-1)

Commentary: The above diagram is typical of many waqfiyyas, whether of Muslims or non-Muslims, and is striking in its attempt to avoid linking women to the group of beneficiaries, even though there was a tendency among Muslims to apply the rules of inheritance to waqfs also (the Ḥanafīs do not indulge in making such rules mandatory). The diagram is structured on a single question: "Is there a male beneficiary?" Yet, and despite this general flight from women, in some cases (C 5-1, 5-2 & 6-1) they did enjoy the full possession or administration of properties that were transferred to them through sharīʻa courts rulings.

would lose its specificity vis-à-vis Bashīr III and his *own* descendants. The same would have happened had *all* of ʻAlyā's *male* beneficiaries left without any single *male* descendant.

Broadly speaking, the conditions of the waqf follow a familiar pattern of family endowments where every possibility is taken into account. The conditions begin with the specific, the immediate descendants of the founder, and gradually lead to the more general: the Shihābs, the poor, and finally God. That movement takes an opposite direction from the "public property" of the sultan, which became his "own" through a polity of conquests, acquisition by force, or simply, as Ibn Nujaym put it, by direct purchase (via an intermediary) of *kharāj* lands whose owners died without heir; in contrast, the "private property" of individuals regresses from the individual himself to his family, then to the more "public" until it goes back to its original source of creation, God.

Waqfs, even though in themselves a form of private property, give their founders the possibility of a radical departure from the constraints of Islamic rules of inheritance. Ḥanafī jurists, beginning with Abū Ḥanīfa, advised that inheritance rules ought to be preferably applied (*yustaḥsan*) to all the beneficiaries of a waqf, but by no means made it mandatory. Maronites in particular, who generally kept women outside property, inheritance, and endowments, found in Ḥanafī courts the normative rules that partially overlapped with their own customs. For reasons outlined in the essay by Ibrahim Aouad (see Chapter 5 *supra*), the conditions of the present waqf clearly manifest a "suspicion" towards women, considered as an element open to the "outside." But even with the restrictions placed upon women by denying them the status of beneficiaries, the waqf of Bashīr III, *for the first two generations only,* was administered and appropriated by women, the wife and daughter of the Emir. And while few conditions were placed upon the male beneficiaries (when available after the third generation), the women had always, if they decided to marry, to restrict themselves to the Shihābs. But this applied only to ʻAlyā and her potential sisters, since for future generations no room was left for women to become administrators or beneficiaries.

A property, being a commodity for exchange, contributes towards status and honor.[14] The accumulation of properties, their size, location, type of

14. For an historical and anthropological look at the notions of property, violence, status, and honor, see Michael Gilsenan, *Lords of the Lebanese Marches: Violence and Narrative in an Arab Society* (Berkeley-Los Angeles: University of California Press, 1996).

production, etc., *taken together* were all status oriented. Not only is it hard to imagine an influential family without an impressive array of properties, but the hierarchy, among the big *muqāṭa'jī*s, was closely associated with how successfully they managed their properties. Because women were rarely from the same "affiliation" as their husbands, they could be a source of dishonor by standing by their fathers, brothers, and cousins, in a moment of crisis; and, if they inherit property at an early stage of their marriage (after, for example, a premature death of their husband), they could legally dispose of those properties at their will (witness how active Ḥusn Jīhān became upon her husband's death), or they could opt for another marriage from someone "outside" the clan, thus increasing the chances for a "loss" of these properties.

Status and honor could also shed some light on the gradual ascension of beneficiaries from Bashīr III himself to God. Since properties were not looked upon primarily in terms of their exchange value, they rather belonged to a world of representation where the property and its beneficiaries were part of a coherent system of signs. Representations of property did not solely accumulate in terms of signs of labor and wealth; rather, the system of signs and representation was more concerned with such things as "family" and "community," the rich and the poor within the same "community," and finally God as the ultimate closure of the system since He is the source of all wealth (hence, property). Furthermore, even when a woman will be, for a generation to come, the *only* beneficiary (and administrator) of a waqf, the conditions proceed to establish women as the "outsiders" to the system of beneficiaries: "family" and "community," as a system of signs, do not include women-as-beneficiaries, as even "the poor in general" were considered more trustworthy a category than women.

In his concluding remarks, the plaintiff's representative addresses himself directly to his colleague, the representative of the wife of Bashīr III.

> His wife, your mandator, has participated [*ishtaraka*] with him in the administration of the waqf until it became officially registered [*tasjīl*] and until it was declared to be legal [*ṣaḥīḥ*]. [Bashīr III] had then legally transmitted [*sallama*] and left [*takhliya*] to his wife this waqf. And now, my mandator would like to re-appropriate [*rujū'*] this waqf for himself so that he might exercise his legal right of proprietor [*mallāk*], and this, according to the opinion [*qawl*] of the great imām Abū Ḥanīfa. I therefore request from you, in my authority as the legitimate representative of the wāqif [Bashīr III], to give me back the sum [that you borrowed from Bashīr III], and to request from your mandator to convey [*taslīm*] the waqf to my mandator.

And, finally, the crux of the argument,

> At this point, Yūsuf Mubārak, the representative of Lady Ammūn, stood firm [*tamassaka*] in his previous position [concerning the legitimate transfer of the

> waqf to Ammūn] and, together with his mandator, recalled the opinions of the two great imāms and jurists, Abū Yūsuf and Muḥammad Abū al-Ḥasan [Shaybānī], thus proving the validity of the waqf [*waqf ṣaḥīḥ*] and its legitimate nature. This conflict, presented to our qāḍī, lasted for a long time, and the latter, after long thought and meditation, decided to rule in favor of the defense because he found the arguments of the defendant more convincing. He thus proclaimed the validity of the waqf...

The importance of these two passages stems from the fact that they are indeed generic to many other cases and have nothing specific to denote of our document here. In effect, they establish a "type-contract," one of the seven listed in Table 2-2 *infra,* with a specific procedural fiction which I will refer to as the "three-founders technique." The purpose of the concluding remarks, written in a classy passe-partout style, was to challenge first the validity of the waqf as a whole and call into question the right of the founder to revoke all the clauses of his original waqfiyya, namely, concerning the change of status of all those properties from milk to waqf (the plaintiff wants them back to their original milk status) and the appointment of the founder's wife as administrator. The text then plays on a conflict of opinions between the founders of Ḥanafism. The plaintiff's side brought forth the arguments of Abū Ḥanīfa who ruled in favor of bequeathers who had revoked their original waqfiyya; while the defense reminded the court of the two opinions of the disciples, Abū Yūsuf and Shaybānī, who both had a contrary opinion to their master. The judge, even though he never stated *why* he himself favored one opinion over another, ruled in favor of the defense.

This set of arguments, very common in nineteenth-century court documents, was framed among Ḥanafīs since the sixteenth century (see below), and their purpose was to legalize the irrevocability of the waqf, which implied the following: 1) To confirm that the original properties of the waqf were milk in the first place, that is, were "owned" by the plaintiff. That was an important part of the package because of the ambiguous status of most rural lands—mīrī or milk?—and because many mīrī lands had their status illegally transferred to milk through ingenious court procedures. In fact, the plaintiff's representative made the claim, at some point in the beginning, that his client decided to transfer a set of properties which were legally his own (*jāren fi milk-ihi wa-taḥta muṭlaq taṣarruf-ihi al-nāfidh al-shar'ī*); but no formal "proof"—either in the form of a written *ḥujja* or witnesses—was ever presented. However, the "ownership" of these properties was *indirectly* certified by the defendant's representative who accepted all the terms of the waqf (*ṣiḥḥat al-waqf*) as presented by his opponent (he solely questioned his opponent's right of representation: thus, the message was accepted but not the messenger; then, once the issue of representation had been settled—by means of two witnesses—the message

was then both accepted *and* certified in a way hard to revoke). 2) Having established that the properties *were* indeed his own, the plaintiff's next concern was to legalize the irrevocability of his waqf in a similar way. In fact, the two steps are closely related and even indistinguishable since the sole purpose of the operation was to make it sound *as if* the set of properties, whether in their original milk or waqf (or even possibly mīrī) status, were indeed the *property* of Bashīr III. (This was the period prior to the Land Code of 1858 and the 1862 court reforms which transferred the registration of purchased lands to a specialized land-registry and thus took them once and for all from the domain of the sharī'a courts.) 3) Finally, in conjunction to 1) and 2), the following procedures secured a de facto waqfiyya: the conditions of the waqf had been clearly exposed and their approval by the court was part of the general deal; an essential part of the conditions was the establishment of Ammūn as the sole *actual* administrator of the waqf; the properties were listed with their boundaries, and "tenants" (or "lessees," whenever applicable); and, thanks to the fictitious debt procedure, the plaintiff's representative's right to represent his client had also been confirmed by the court. Thus, *in toto,* Bashīr III had the status of his waqf validated. And because this was a litigation that involved a formal *khuṣūma,* the judge's ruling was more than a regular approval: it was a total confirmation that would be difficult to revoke in the future (by potential beneficiaries, for example).

The origins of the "three-founders" technique

[C 6-2] Due to the importance of this type of waqf procedure, which establishes the irrevocability of a waqf and its ubiquitous nature in the sharī'a courts, it is worth having a second look at yet another similar case before closing this chapter. The founder was here Aḥmad Ḥusayn al-Qabbānī, whose waqf was composed of core properties as such, in addition to an "annex (*tābi'*)." As we shall see, the distribution of revenues among beneficiaries was crucially different between the waqf itself and its annex. The waqf *per se* was composed of two different sets, first the family home and its related space, all located in Sūq al-Ḥaddādīn ("Blacksmith Market") by the road leading to the port of Beirut, while the second set, consisting of all the built areas of a garden, was in the neighborhood of the Bāshūra cemetery. Finally, the annex was in Bustān Munayminah in Sūq al-Quṭn ("Cotton Market"), located in the Christian neighborhood (*maḥallat al-naṣāra*), all of which were in Beirut *intra-muros*.[15] Among the listed properties, one is worth keeping our eyes on

15. Document dated 13 Rabī' 1259/April 13, 1843 (Beirut), and reproduced in Ḥassān Ḥallāq, *Awqāf al-Muslimīn fi Bayrūt fi al-'ahd al-'Uthmānī* (Beirut, 1985), document #22, 123-127.

since it will be the source of the current litigation: half of a well that was part of the compound of the familial home is described as a *niṣf shāyi‘,* from *mushā‘,* meaning a jointly owned property (or a *contingent indivis*); but no indication is given as to who were those "sharing" that part of the property. In a way very similar to the waqf of Bashīr III (C 6-1), the founder created an endowment first for himself, and then, regarding the familial domain itself, for his male descendants and their descendants, the males only to the exclusion of the females; and, if no males were available, the revenues of the endowment would go to the poor and needy of the people (*ahl*) of the Ḥaramayn in Mecca and Medina. Interestingly, even though much smaller, the annex followed a different pattern of distribution from which the women were not excluded, but still underprivileged.

The text then specifies that the endowed properties were originally "owned" (as *milk*) by the founder either through purchase or inheritance. Thus, the house of Sūq al-Ḥaddādīn was known to be his father's; as to the *bustān,* located close to the Bāshūra cemetery, it was "known" to be that of the wāqif himself; also included were the *īwān* and *murabba‘* in the same location. Hence, all these properties were dedicated to the waqf, with the founder himself as the first beneficiary, and, regarding the familial domain, to be followed by his male descendants (three sons), while his seven daughters could live, as long as they were not married, in their father's house and use for their own convenience the built areas in the *bustān*; but they enjoyed no right whatsoever in the revenues of this part of the waqf at least; in short, unlike the waqf of Bashīr III, the women were here were only partially excluded.

There was also an "annex" (*tābi‘*) consisting of a couple of additional properties: another *bustān,* and a warehouse, both located in the "Cotton Market" in the Christian neighborhood of Beirut, and described to be ready for the *ghallatu wa-l-istighlāl,* that is, to be rented and to have their rent extracted. The beneficiaries for this "annexed" part were first, the founder himself, then his three sons *and* seven daughters—the females should have half of the males' shares; but upon any of the females' death, her revenues would be transferred to the males *only:* thus, her sisters and descendants (if any) would not be permitted to share any of the revenues. More specifically, the conditions stated that women, "and those of higher rank (*fa-man fawqihā*) [that is, their brothers]," have a right to the revenues; and if anyone of the beneficiaries would find herself/himself on her/his own, that is, without anyone else of the same "position" (*daraja*) or generation (*ṭabaqa*), then the revenues would go for this one person only.

Thus the founder's seven daughters were given half of the revenues for that part of the waqf only, but even though that privilege was granted to them only, it was withdrawn from their descendants. Moreover, the share of a deceased

daughter would be added to those of her brothers while the sisters would be excluded. But if the founder's daughters were discriminated against when it came to their own descendants, at the other side, regarding their brothers' descendants, there was no specific clause that would cut the benefits from the female descendants. What the founder created—at least for the annex—was a complex system of checks and balances dividing all his beneficiaries along upper and lower generational lines, and their degree of "closeness" to one another. Consider the founder as generation 1, and his three sons and seven daughters as generation 2, and all the children of the latter as the third generation. As long as the founder himself was alive, he would be the sole beneficiary. Upon his death, the revenues were to be divided for a total of thirteen shares (seven for the females and six for the males) that would have included all the beneficiaries of generation 2, assuming all were alive at the time. Since those of a lower generation are not eligible as long as any higher one is still alive, generation 3 would not yet be entitled for its portion of the revenues. So the general rule is that each generation, males and females, benefits individually, including the one above (which, in principle, should never occur because the one above would then be the only one entitled) but excluding those below. In principle, the females in generation 3 should be eligible, on the basis of half the share of their brothers, once no one is left in 2. As long as *one* of the brothers and sisters in generation 2 is still alive, he or she will be the *only* beneficiary. Suppose now that a male beneficiary from generation 2 dies without having yet benefited from the waqf (because the founder was still alive), then, upon the founder's death, in addition to all the beneficiaries in generation 2, the children of the deceased male in 2 would share the revenues with their uncles and aunts: that was the only way for beneficiaries from two different generations to share the revenues. There are still few other twists and turns in the conditions set by the founder for his annex, but they are not crucial for an understanding of the core of the case, which is yet to come.

In fact, as was customary in fictitious litigations, the contractual elements are set first only to be challenged, either in toto or partially, by either the plaintiff or defendant. In the case of waqfs, the contract consists in delimiting first of all the milk properties to be converted into waqf, then the conditions must be clearly established, and finally, an administrator must be named for each line of beneficiaries, usually the *arshad.* Since all those contractual elements have already been validated—in lieu of a waqfiyya—the waqf now needs to be made irrevocable, hence the fictitious litigation. We are told in the last concluding part of the document that the founder decided to associate with him in the administration of his own waqf a certain Ṣāliḥ b. Muṣṭafa Qurunful as partner (*sharīk*). And then the text adds, that once the founder furnished all

his conditions, "it occurred to him [*'anna*] to withdraw [*rujū'*] everything he had set for his waqf so that all its properties revert back to their initial milk status." He then challenged his partner in a formal litigation thus claiming the non-validity of the waqf on the basis that some of its parts were joint-property (*mushā'*). He upheld his view "on the basis of an opinion by the imām Muḥammad Abū al-Ḥasan [Shaybānī], one of the two companions, regarding the invalidity of the irrevocability of the waqf [*'adam luzūmi-hi*], and this in turn was based on an opinion by the great imām Abū Ḥanīfa." The partner-defendant for his part challenged with an opposing view based on Abū Yūsuf which stated the validity of a *mushā'* waqf, and he added that both Abū Yūsuf and Shaybānī, in opposition to their Master, argued for the irrevocable nature of all waqfs once their conditions were stated. In the presence of fourteen witnesses, the judge ruled in favor of the partner and accepted the condition of irrevocability of the waqf.

Needless to say, this case represents only a variation from the waqf of Bashīr III (C 6-1) since in both the purpose of the procedural fiction was to establish the condition of irrevocability known as *luzūm*. The differences are more formal than substantive: (1) Since in the second case the founder introduced his waqf all by himself in court, there was no need for the debt-procedure anymore whose purpose was to identify the representative. (2) The fictitious litigation in the second case occupies only the concluding part of the text, so that the main part is devoted to the waqf itself and its conditions. (3) Besides the condition of irrevocability, which was the *raison d'être* for both litigations, the second case stumbled on the issue of *mushā',* which had received a favorable opinion in the name of Abū Yūsuf.

It is precisely the debate over the irrevocable nature of a waqf that points to the possible nature of a fictitious litigation. In fact, among the three founders of the Ḥanafī madhhab, it was only Abū Ḥanīfa that championed the idea of revocable waqfs. The founder may at any time revoke either partially or totally the conditions of his waqf on the basis that, as long as he is alive, he owns the *'ayn* of the trust, which then passes to the beneficiaries. Both Abū Yūsuf and Shaybānī, however, thought otherwise: waqfs are irrevocable *ab initio*. The trust becomes irrevocable only by a judge's ruling as a procedural outcome to a fictitious litigation whose prototype is the case of the waqf of Bashīr III. In what became standard routine in Ottoman times to make waqfs irrevocable—a procedure which, in turn, was recommended by Qāḍīkhān—the founder-plaintiff, based on Abū Ḥanīfa's opinion, would claim in a fictitious litigation that he decided to revoke his waqf and modify some or all of its conditions. The administrator-defendant, for her part, would protect her position by means of the two disciples' opinions on the irrevocable nature of waqfs, and the judge would rule in her favor. As early as the mid-sixteenth

century, the muftī Ebu's-su'ūd recommended the procedure on the following grounds.

> A person wishes to convert some of his property to trust. How should he do this to ensure that the trust is irrevocable?
>
> *Answer:* He should convert it to trust, assign its expenditures in perpetuity, and deliver it to the trustee. He should then go to the judge, and give the details of how he has assigned the expenditures and delivered [the trust] to the trustee. After the trustee has confirmed [this], he should demand the property back from the trustee, saying: "It is not trust in the opinion of Abū Ḥanīfa. I have retracted and will take [back] my properties." The trustee should then say: "It is binding according to the two Imāms [i.e. Abū Yūsuf and Shaybānī]," and not return the property. The judge, for his part, should say: "I have decreed that the trust is valid and irrevocable," so that it does not revert.[16]

To my knowledge, this is one of those rare opinions that directly endorses a procedural fiction that became standard in sharī'a documents. It remains to be seen, however, whether such an opinion was the result of a consensus among scholars or simply endorsed on a de facto basis from court practices and the like. But it leaves us uncertain as to the *origin* of all fictitious litigations as presented in this study: Where did they originate from? And is it possible that they solely emerged from the court practices and later endorsed by jurists? If judges had the power and were able to create procedures on their own, the courts would then be assuming more than simply "applying the law."

Debts, contracts, and the status of waqfs

When an obligation involves a debt consisting of a cash sum or a fungible commodity, it is known as *dayn.* When the obligation involves specific non-fungible objects, it becomes a *'ayn.* Ḥanafī practice looks primarily at the exchange of commodities in terms of their exchange as objects rather than as personal (subjective) obligations. Whenever the obligation involves non-fungibles, a period for delivery is invalid. Only fungibles could be associated with a period of delivery.

For all the debt-contracts in this study, a couple of reminders. 1) The first part of the litigation involves a *dayn,* or the exchange of money for money, while the second part, which constitutes the essence of the case, involves a

16. Quoted in Imber, *Ebu's-su'ud,* 148.

'ayn or transfer of properties. 2) The *dayn* is between the representatives of the plaintiff and the defendant, while the *'ayn* is between the plaintiff and the defendant. The plaintiff thus transfers his or her properties without receiving any compensation, whether monetary or otherwise. 3) The representative plays a key role in this transaction, and in order to receive a full authority to complete the transfer which is granted in Ḥanafī practice under certain conditions, the fictitious litigation against the plaintiff-creditor would identify all the representative's privileges. (When the obligation involves labor it is referred to as *'amal.*)

The notion of *dayn* involves an obligation to deliver.[17] When restricted to its original idea of credit or monetary debt, it does not yet involve an obligation to deliver, similar in that respect to the creditor/debtor notion in Roman law. The debt obligation could either be the outcome of a contract or a reparation for a damage. Knowing that the tendency among Ḥanafīs has been to abstract from internal motives in order to reduce a contract to its manifest utterances, not much is to be expected in terms of an emphasis on the contractors (persons) themselves. Since a debt involves a contractual obligation, what is then the foundation of a *dayn*-contract? Debts are usually associated with *dhimma,* a safekeeping device that involves the responsibility of the debtor. Thus, the debtor has in his "consciousness," *dhimma,* the sum of money which is the property of the creditor (*māl ḥukmī*), and that needs to be reimbursed to the latter. A debt is therefore a de facto contract, and is probably the earliest form of contracts since it presupposes an immediate reciprocity. A gives B a sum of money, and unless it is a donation or gift, or unless B made a promise to buy something from A or provide him with a service (such as the use of a shop), B is expected to give it back at some moment in time. Debts are therefore by definition the simplest of all contractual forms (in particular when no debt-with-interest is involved) since it involves nothing but a remittance of a sum of money. A would not have given B the money unless B requested it and promised to pay it. By contrast, a contract of sale already involves several complications over debt. If A sells a commodity to B, B at a minimum must have approved the price of the commodity and the terms of payment; he also needs to check on the quality of the commodity upon delivery. Moreover, *dayn*-contracts are ideal from the Ḥanafī viewpoint because they are bilateral and synallagmatic: not only an equal value is exchanged back and forth, but the creditor-promisee is promised by the debtor-promessor that he'll eventually reimburse his debt, so that the initial step receives something in return.

17. Chehata, *Théorie,* § 260, p. 170.

Since contracts in general are not necessarily concluded in writing, the only way for a court to confirm a debt is by means of the usual witness-procedure. The plaintiff claims that the defendant owes him "in his *dhimma*" a sum of money, and brings two witnesses as evidence. As the simplest of all contractual forms, debt became in Ottoman times a favorite of the sharī'a courts to confirm a representative's rights and duties, as assigned by his mandator (the plaintiff), prior to conducting a hearing. In fact, the debt-procedure became in many fictitious litigations a preliminary step towards establishing a *'ayn*-contract, so that the debt itself was synonymous for taking action over the (disputed) *'ayn*. Thus, in a way strangely similar to sixteenth-century English common law, the debt takes on a double meaning: at the same time, the sum to be refunded *and* a possible court action.[18] Similarly, Ḥanafī practice became more interested in the lawsuit that could ensue from a debt, and the modalities of its procedures, than in the debt itself. With the static notions imposed by Ḥanafīs on property and contract, a broad notion of debt—one that would identify a seller-buyer relationship with one of creditor-debtor—helped in forging more extended contractual alliances by means of newly designed court procedures.

In his celebrated *Common Law,* Oliver Wendell Holmes argued that between debt and "consideration" lies assumpsit: "the rule [of consideration] originated with debt, and spread from debt to other contracts."[19] Debt was therefore the oldest contractual form, and in order to be proved, witnesses were used to establish debts. But those were not the witnesses we know today: "They were not produced before a jury for examination and cross-examination, nor did their testimony depend for its effect on being believed by the court that heard it."[20] In other words, oath-witnesses were not meant to be believed, they were supposed to take oath to confirm an oral debt simply because there was no other way to prove it (a written statement by the debtor would pose other problems such as verifying the authenticity of the handwriting and signature; seals, which came at a later stage, added to the reliability of documents). Holmes then argues that "Assumpsit introduced bilateral contracts, because a promise was a detriment, and therefore a sufficient consideration for another promise. It supplanted debt, because the existence of the duty to pay was sufficient consideration for a promise to pay."[21] In short, assumpsit involved an implicit consideration, an advanced form of debt, but not yet the explicit

18. Jean-Claude Montanier and Geoffrey Samuel, *Le contrat en droit anglais* (Grenoble: Presses Universitaires de Grenoble, 1999), 14-15.

19. Oliver Wendell Holmes, *The Common Law* (New York: Dover, 1881), 259.

20. Holmes, *Common Law,* 255.

21. Holmes, *Common Law,* 287-88.

"consideration" which is the cornerstone of contracts in Anglo-Saxon common law.

In Ḥanafism the closest contractual form to a *consensus ad idem,* one that requires a perfect accord between offer and acceptation, is the *ījāb wa-qabūl.* Already *ījāb,* which implies in its preliminary meaning an act of establishing and imposing (*ithbāt, ilzām*), is the primary offer (*ajāba* also means to reply, so that even in the "offer" itself the law considers an element of "promise" or "obligation"), to be followed, on the other side, by the *qabūl.* Recognized by the Majalla as the most general contractual form, it needs to be seen whether the *ījāb wa-qabūl* represents a more mature contract than debt, or is even a departure from the latter. One thing is certain: even though the *ījāb wa-qabūl,* in its most basic form, is a bilateral oral contract between one that proposes and another that accepts the offer, the bulk of all sale and hire contracts in nineteenth-century sharī'a courts, were concluded on the basis of an *ījāb wa-qabūl.* Those were for the most part simple contracts that did not occupy more than few lines in the qāḍī's sijill (C 3-2), and, all by themselves, made over half the cases in the court records of Greater Syria. Besides identifying the contracting parties (and their representatives, if any), the text comes to the object of the contract, whether it is for sale or hire, names a price (even though that is not a requirement among Ḥanafīs), and then confirms that the contract was one of *ījāb wa-qabūl,* and that it was performed voluntarily without duress (*ṭaw'an wa-bilā ikrāh:* Ḥanafīs invalidate a contract when completed under duress). Those contracts mostly covered the sale or lease of homes, shops, and the like, and even though small parcels of lands located within the city could also have been part of the deal, by contrast, rural lands—at least those with mīrī dues, with a significant production—were seldom handled in an *ījāb wa-qabūl* contractual form. Rural lands and waqfs were in fact often the object of fictitious litigations, which as such were extended contractual forms over the traditional *ījāb wa-qabūl.* In effect, even though in its original pure form the *ījāb wa-qabūl* was a bilateral oral contract, a trend was established to ratify it in writing in a qāḍī's court, even though that was not a requirement of the law. Moreover, unlike similar Roman contracts (such as the *stipulatio* or *sponsio*), the *ījāb wa-qabūl* does not require a specific question-and-answer formula (such as the use of a particular verb to create a contract)[22] since the two parties are not limited to specific utterances. Besides the fact that the offer and acceptance has to be exchanged orally in a specific location (*majlis*), no

22. Alan Watson, *Roman Law and Comparative Law* (Athens, Georgia: University of Georgia Press, 1991), Chapter 7.

delay was to intervene between the two. Because of the very limited time framework, the *ījāb* contracts have to be simple and limited for the most part to a definite set of *aʿyān* (pl. of *ʿayn*) that could be either purchased or leased. Thus, debts that fall under the category of *dayn* rather than *ʿayn* are typically not covered in *ījāb* contracts. Those had a fictitious formula of their own whose purpose transcended debt as such (C 3-1).

Which brings us to the question on whether *ījāb* contracts were a step forward from the limitations of the more primitive debt contracts. A common ground exists between *dayn* and *ījāb* in the form of an oath-witness-procedure, but what makes *ījāb* a more advanced contractual form is its general nature. In fact, a debt could in principle be sustained under an *ījāb wa-qabūl* stipulation, but since Ḥanafīs maintained a separation between *dayn* and *ʿayn,* debts were kept within contracts of their own. What needs to be addressed is the "limitation" of *ījāb.* In fact, the sharīʿa court records show a proliferation of contractual forms—*marṣad, dayn, khulū, musāqāt, muzāraʿa, mashadd maskeh, waḍʿ yad,* and "the three-founders" technique, etc.—all of which were simulated fictitious litigations, and all manifested a single desire: to push the Ḥanafī law of contract to its limits in order to create a greater variety of contracts on more secure grounds. Indeed, a major "limitation" of the *ījāb wa-qabūl* stipulation is its oral nature, which means, an oath-witness-procedure in the presence of a judge to ratify the contract in writing, which was what the bulk of the court documents did. Another limitation is that the *ījāb* stipulation commanded an immediate offer and acceptance which limited both the time framework within which it operates and the space for its conclusion (a majlis with a couple of witnesses). What the proliferation of alternative contractual forms points to, however, was a need, resulting from various societal demands, to ratify contracts where the delivery of the commodity is suspended to a future time, so that payment and delivery do not necessarily coincide. Moreover, the procedures for such contracts had to be worked out to legalize them and render them hard to revoke. What some sections and chapters of the late Ḥanafī fiqh manuals confusingly point to, such as Ibn ʿĀbidīn's *Radd,* is an explicit acknowledgment of such "illegal" contracts as the ones enumerated above. But a closer look at those texts, however, does not point to much effort in terms of procedural solutions, much of which had to be devised in the sharīʿa courts themselves. It remains to be seen, however, whether the proliferation of all those contractual forms, combined with the juristic efforts to integrate them within the domain of the fiqh, modified Ḥanafī substantive law as such, or whether it simply implied procedural modifications, as legal subterfuges (*ḥiyal*), with no effect whatsoever on the substance of the law itself.

It thus looks certain that the *ījāb wa-qabūl* was the oldest, most common, and most general contractual form. But designed in the first place as an oral

covenant with few formalities (a contract could be concluded even with no witnesses present on the scene), the *ījāb* was probably a contract not destined to be concluded in court in the presence of a judge. That it proliferated to such a degree throughout the Ottoman period to the point that it became the leading contract in the sharī'a courts could be an indication of the primacy of *written* contracts—at least in urban areas—approved by a judge, and with witnesses. Since their number increased greatly between the eighteenth and nineteenth centuries, the likelihood is that people were looking for more reliable contracts, ones that could be accepted in court if a litigation arose over the property in question.

But if the *ījāb* was not primarily destined to be concluded within the confines of a sharī'a court, the other contractual forms enumerated above would have been unthinkable outside the court system. For one, they all seem to have been late developments of the Ottoman period (how late is a question that needs more empirical research, beginning with the sixteenth century), primarily prompted by the need for more flexible contracts, ones that would operate within longer time frameworks than normally permitted among Ḥanafīs, and in which one party would act as a "creditor" of some sort towards the other, through a euphemized "loan-with-interest" (C 3-1). Second, the procedures for such contracts typically consisted of fictitious litigations, which means that they could not have possibly flourished outside the sharī'a court system. Third, those contracts are so different in their form and structure from the *ījāb wa-qabūl* that it is hard to conceive of them as having emerged in some way from the latter, or even to pose them as related. In fact, not only the *ījāb* could be informally concluded outside a court, its time framework and simplicity is precisely what the other contracts attempted to bypass. Fourth, the proliferation of contractual forms did not much affect the substance of Ḥanafī practice. Indeed, their sole purpose was to avoid substantive law by shifting to procedure through legal subterfuges.

Consider the *marṣad* as an example of those extended contracts that were court specific (C 3-6). The plaintiff-tenant requests from the defendant-administrator to acknowledge his "investment" in the waqf, which consisted, according to the plaintiff, in financing, maintaining, and repairing its properties. The so-called investment, once acknowledged by a ruling, would give the plaintiff not only the benefit of a long lease, at least far longer than the legally accepted three-year renewable term, but also that lease would only cease once the investment—the *marṣad*—has been reimbursed. In other words, by means of legal subterfuges, a tenant is thus able to invest in his waqf so that his lease is indefinitely extended. The notion of *marṣad* was accepted in the late Ḥanafī literature, such as Ibn 'Ābidīn's *Radd,* on an ad hoc basis as a necessary device that resulted from the low rents that waqfs in Greater Syria

had to endure. That, in turn, was an outcome of the iltizām policy, which forced the multazims—a class the jurists looked upon with contempt—to compete for high mīrī rates, thus exacerbating the downward movement of low rents for both mīrī and waqf lands. Jurists, however, while accepting the *notion* of *marṣad,* left it to the courts to work out the *procedures.* Both notion and procedure, however, do not substantively alter any of the classical notions of tax, rent, and land-tenure. Once more, legal subterfuges and their court procedures saved substantive law from a major change. The same could be said regarding other types of extended contracts, such as those leases based on sharecropping (*musāqāt* and *muzāra'a*), in which the rent (*ujra*) consisted of a combination of a cash monthly-payment (referred to as *ujrat al-mithl,* the fair or average rent) and another payment in kind consisting of a share of a produce. Such a combination allowed, as with the *marṣad,* for circumventing the low rents and price fluctuations over the years, so that the payment in kind would limit such losses. Again, even though sharecropping contracts and their *ḥiyal* were acknowledged in the late Ḥanafī literature, their procedures could only be reconstructed from the court records.

Thus Ḥanafī legislation regarding both milk and mīrī lands remained for the most part pretty much conservative and underdeveloped. Even the obsolete character of such archaic notions as the *'ushr* and *kharāj,* which as early as the sixteenth century the muftī Ebu's-su'ūd had already declared as invalid, did not undergo major revision in the late Ḥanafī literature (up to the mid-nineteenth century) that would account for the realities of the mīrī and iltizām. But to understand how Ḥanafī substantive law survived that long without any need to modify its basic premises regarding land-tenure and contracts, one must carefully look at the sharī'a court procedures, on the one hand, and those of the regional councils, on the other. Thus while the court procedures pushed the law of contract to its limits, those of the regional councils created a jurisdiction specifically for mīrī lands.

The societies of Greater Syria (and Ottoman societies at large) were very much preoccupied in defining the borderline between the possession and ownership of a property. While the corresponding Roman notions of *possessio* and *proprietas* could find their Ḥanafī equivalent in *waḍ' yad* (*taṣarruf* in the 1858 Land Code) and *milk,* there was a strong preoccupation in the sharī'a courts with disseisin, or the wrongful dispossession of one in the possession of real property. The courts thus created procedures that would acknowledge that a property that was illegally possessed (or illegal occupation, *waḍ' yad*) by the defendant for a period of time was in fact the legal ownership, *milk,* of the plaintiff (Chapter 5 *supra*). Such litigations were, however, mostly fictitious and enabled a full ownership for the plaintiff. Thus, in contrast to English common law, during Henry II's reign, where "the preoccupation with

seisin... was now at the disposal of all free men,"[23] the proof of full ownership (*milk*) in Greater Syria was a privilege for the happy few who could prove that their possession of a property lasted for a period of time and was legal. Their ownership would then be legalized. But despite the archaic nature of Ḥanafī legislation regarding land-tenure, it was the sharīʿa courts, based on the opinions of jurists, which had to decide upon disputes that bordered the thin line of possession and ownership right (*milk*). The late jurists have argued that the occupation (*waḍʿ yad*) of a land, which implies a de facto possession, and its cultivation over a period of time—which remained unspecified—establishes an ownership right to the point that it did not matter anymore who the "original owner" was. Ḥanafism thus took possession and ownership very pragmatically: 1) by rejecting the notion that full ownership as *milk* implied a right that could not be challenged once and for all; 2) by considering the essential nature of Ottoman societies, which were agrarian, a distinction between possession and ownership would thus help towards a process of occupying and laboring land without any need to prove ownership; and 3) the law applied even when the state proved to be the sole owner of the occupied land by private individuals. In short, the Ḥanafīs privileged those who were working on land without a formal proof of ownership: better still, in the framework of a potential litigation, the law would protect a defendant (or plaintiff) that could establish his rightful occupation/possession of a land and his working on it. On the other hand, the possession-ownership borderline became the source of fictitious litigations that would establish a defendant's (sometimes a plaintiff's) right of full ownership. Such legal techniques were useful mainly in the transfer of properties among family generations (C 5-1 & 5-2). That trend, however widespread it might have become, did not of course prevent other genuine litigations over the possession and ownership of land (C 7-1).

The jurisdiction of Ḥanafī practice, however, remained limited to the sharīʿa courts, and so did the possession-ownership lawsuits. In fact, seldom did the sharīʿa courts adventure into litigations over mīrī lands, a domain which they left to the regional councils. Overall, the "private" jurisdiction of the sharīʿa courts, even on matters as crucial as possession-ownership, was an indication of a lack of interest of state legislation and involvement whenever mīrī lands were not the issue. For their part, the regional councils, even though had to tackle litigations far more complex than those of the sharīʿa courts, succeeded in routinizing all kinds of complaints received from private parties over conflicts arising from labor on mīrī domains. The routinization

23. R.C. van Caenegem, *The Birth of the English Common Law*, 2nd ed. (Cambridge: Cambridge University Press, 1988 [1973]), 44.

procedures could be compared to the writs of the English common law in that they provided a formula for litigation. Most of them formulated complaints by peasants over mīrī dues: "The peasants of locality X complained, in a memo addressed to the defterdār, of the distribution of the mīrī dues over a one-year period as imposed by their *ṣūbāshī* (or moneylender, or multazim). They therefore request the honorable majlis to look over the distribution of their mīrī dues, considering in particular the bad winter harvest and the erratic rainfall." The majlis would then reconsider the mīrī dues for the village, either by opting for a different calendar, or, better still, request less for the year (or modify the proportion of goods to be delivered in cash or in kind). The point here is that up to the 1858 Land Code, land legislation remained pretty much underdeveloped so that all kinds of procedural actions took over. This shows that even for a domain as crucial as land, its productivity cycle, rent and taxation, while Ḥanafī practice maintained its jurisdiction over private disputes, the state was not that aggressive in its legislative efforts and was not pressed to impose itself on the sharī'a courts—at least not until the Niẓāmī courts came into being in the 1870s and later.

The purpose of this chapter was to explore the relationship, if any, between the general theory of contract explored earlier (Chapter 3), and the proliferation of procedural fictions targeting waqfs in particular in addition to other forms of property as well. The point here is that too much has been said on the quasi-private nature of waqfs, but not enough on the fact that "the right of property" to waqfs had to go through a similar set of contractual settlements as other forms of property. What was unique to waqfs, however, was a portfolio of properties whose general contractual settlement did bind a generation of beneficiaries to one another, for better or for worse.

The path proposed in this chapter looks upon the *ījāb wa-qabūl* contractual form, which by far was the most common form of contract in the sharī'a courts, as a development over the more primitive *dayn*. The *ījāb,* however, was too rigid a formula to accommodate contracts where either the delivery of the product or the completion of the payment had to be postponed at a later date. What was in effect ideally needed was a more flexible contractual form that combined *dayn* with *ījāb,* in other words, one in which a deferred payment and delivery *ipso facto* implied a *dayn*. Since such a conceptual notion, however, was never properly worked out by jurists (not even by the committee of the Majalla), several contractual forms proliferated, all of which were endorsed by the courts and hesitantly by jurists, and all of which had one thing in common: they all carried long-term investments. The fictitious litigations, as we have presented them thus far (and more is to come), are a further extension of this process; in their own way, they make possible forms of contract that would have been difficult under normal circumstances. In effect, fictitious litigations

are nothing but simulated conveyances that validate and render irrevocable a transfer of title-ownership, be it in milk or waqfs. It must be made clear, however, that such legal subterfuges added nothing to the substance of the law but only to its procedures since the fundamental Ḥanafī notions were kept untouched.

To conclude, two sets of discourses were at work here. At one level, jurists, teachers, muftīs, and judges, were all restricted by legal doctrine, and all acted in accordance with the canonical logic of juristic discourse. At another level, the sharī'a courts, which assumed the existence of juristic discourse and its requirements, also, in the absence of clearly updated texts, had to create their own interpretations and procedures. To be sure, such levels were neither separate nor autonomous from one another: jurists, muftīs, teachers, and judges, were all integrated and assimilated within the same school of thought, and their roles were interchangeable. Throughout this study we have been concerned with two sets of interrelated questions: What is the logic behind judicial decision making? And, more generally, what is the logic of legal reasoning? If, as we have been arguing, decision-making involved at times creating procedures for which there was no clearly-stated text, then the obvious question is, How did judges do it? Considering that the three sources of law were the Ḥanafī fiqh, the qānūn, and custom, how was the logic of judicial decision making textually constructed? Consider the various forms of fictitious litigations encountered thus far and the ones to be discussed later (see supra Table 2-2). All of them contained, *in each single case,* a combination of visibly unrelated arguments: for example, a debt, together with a case of adverse possession, all of which were fought with conflicting opinions from the three founders of Ḥanafism, and other authorities as well. Each argument was not unique to the case in question, and could be compared to a plug-in model which could be used in different cases by simply modifying the variables. Each argument taken separately might have had a precedent in terms of juristic opinions, but even that remains uncertain, and they rather seem to have been "based" on some text, then modified accordingly to fit the needs of the court system. The "novelty," therefore, if novelty there is, consisted less in challenging the substance of the law than in working out procedures that would bypass its limitations, more specifically the law of contract. The question could then be formulated as follows: How were such procedures worked out? Did they originate in the courts? Even though it is beyond the scope of this study to determine for certain the role of the courts in constructing newly formulated procedures, let us give them some credit and see where that would lead us to. If judges played some role in constructing a body of procedures whose textual links to the canon remains uncertain, how did they do it? It is at this point that legal doctrine could be helpful. In fact,

whenever judges felt the urge to construe a ruling for which there was no direct textual evidence, and unless they found rescue in a muftī's fatwā (C 7-2 *infra*), they were left with a couple of alternatives—either begin with a specific text and subject it to an open interpretation, that is, *ijtihād,* or else rely on one of the major principles in legal doctrine, such as the ones discussed earlier. In effect, even when no specific text was available, decision making was usually fought with the larger compass of legal doctrine. It is indeed at this level that both judicial decision making and legal doctrine intersect, and their importance to one another becomes even more fundamental once we realize that beyond the known textual evidence, the fatwās, and the routinized procedures, comes a domain of uncertainty which ultimately judges had to delve into, and legal doctrine and the corresponding logic of its discourse was what integrated their decisions together.

Tables 6-1 & 6-2. Waqf properties of Bashīr III (C 6-1)

Commentary: The waqf of Bashīr III comes in two different sets, of 45 and 6 properties respectively, but it remains unclear why they were handled in two different cases, amid carrying the same date and being handled with identical procedures. For our purposes here, the importance of such tabulated lists of properties stems from the fact that they show in one glance the various networks that made the existence of the waqf possible. In effect, all 51 properties, mostly located in the southern "suburbs" of Beirut, were for the most part leased to independent tenant-farmers and were surrounded by other privately owned properties either to the Shihābs or the Junblāṭs. But even though all such tenancy contracts were negotiated independently, they were nevertheless part of the same waqf compendium and hence under one administration. Being located in the vicinity of Beirut, and on the Lebanese coast where water canals were abundant, it is to be expected that the yield of such properties would be higher than in other parts of Greater Syria. For one, the peasantry was not under corvée conditions, and apparently only negotiated for tenancy contracts (hence the lands became "known" under an individual's or family's name) that were nominally "free." For another, most of those properties had olive and mulberry plantations, and, in the case of the latter, they were thus part of the prosperous Lebanese silk trade that gave the coastal and mountainous regions an impetus of their own. But it remains uncertain how much "freedom" those tenant-farmers effectively enjoyed, in particular when it came to receiving cash-loans, or negotiating their contracts, and last but not least, selling their produce.

Table 6-1
Waqf of Bashīr III (1) (C 6-1)

#	Property[24]	North	South	East	West
1	Two pieces of land (*qiṭ'a-tay al-arḍ*)[25] located in *mazra'at*[26] Ḥārat Ḥurayk[27] on the coast south of Beirut: 1. "known for"[28] Nimr al-Kisruwānī composed of land, trees, a house (*bayt*), etc.; 2. known for Ilyās al-Naqqūr and contains land, plantations, olives, etc.	*Qiṭ'a*[29] of the monks of Dayr Mār Mūsa.	Property[30] of the children of Emir Sa'd al-Dīn Shihāb.	Property of the children of Emir Salīm Shihāb.	Public Road.

Table 6-1: 1/9

24. The list of properties below follows the exact order they were listed in the text; however, descriptions of properties do not necessarily follow the exact wordings of the original and some numbers, quotation marks, and punctuation have been added for clarity. The same applies to the four directions surrounding the listed property.

25. *Qiṭ'a* is a general term for part, fraction, or piece.

26. Probably the equivalent of the Turkish *çiftlik,* that is, an area of cultivated land, usually a medium or large estate outside the boundaries of a village or town. In the case of the waqf of Bashīr III, the *mazāri'* were mostly located in the vicinity of Beirut and typically contained lands with plantations (*ghirās ashjār*), some wild and uncultivated (*barrī*) areas, in addition to a built area (*'amār*) containing homes and warehouses with wooden ceilings, among others.

27. Today one of Beirut's southern suburbs, mostly Shī'ī populated.

28. The term "known for" (*al-ma'rūf bi...*), perhaps, "known by the name of," "attributed to," seems to mean "in the possession of" or "the property of." (In this case, all 45 listed items were in principle only the "property" of Bashīr III.) In fact, a name and family is usually associated with each one of these properties (and, at times, the same "known for" name is associated with several properties); this should lead us to the conclusion that "known for" ought to be taken strongly, as a private property (in the hands of Bashīr III) that was "rented" by a "tenant-farmers" (mostly middle-class Christian farmers). However, it is quite probable that a property, at the time when the status of the waqf of Bashīr III was debated in court, was neither owned nor "rented" by the name with which it had been associated with. In fact, the property in question could have been "known by the name of" someone who owned it or leased it before, that is, it was not uncommon for properties, locations, and public locations to be associated with the names of individuals or families who were linked to them for a long time. In the case of the estate of Bashīr II, properties were generally described as in "the possession of..." (*bi-mu'āmalat fulān...,* "taken care of by"), which implied an act of "lease" (i.e., "possession") for a period of time for a property that was the "private ownership" of an individual or family. I am assuming here that both terms, *al-ma'rūf bi* and *bi-mu'āmalat* denote something quite similar, if not identical, that is, the "possession" of a "private property" for a limited period of time.

29. *Qiṭ'a,* meaning in this context "a piece of land," is used interchangeably with *milk* and denotes something similar: a private property.

30. Property is here the translation of *milk,* meaning a "private property" in the strong sense of the term, that is, a property which was not state owned (*mīrī*) could be transferred to another proprietor, bought and sold freely with no restrictions, or converted to a waqf.

#	Property[24]	North	South	East	West
2	"Piece" (*qiṭ'a*) [of land] known for Ḥabīb b. Ilyās (same location as #1 above) composed of a land, trees, built and covered areas, etc.	Property of the children of Emir Salīm Shihāb.	Property of the children of Emir Sa'd al-Dīn Shihāb.	Property of the children of Emir Salīm Shihāb.	Property of the children of Emir Sa'd al-Dīn Shihāb.
3	Land with plantations (*'aoudit*)[31] known for Ilyās al-Naqqūr (see #1) composed of land with mulberry and olive plantations, etc., located in *mazra'at* Saṭliyyah [Suṭaylah?] on the Beirut coast.	Orchard of olives and fig known also as "Nimr" (cf. #3, south).	*'Aoudit* known for Nimr al-Kisruwānī.	*'Aoudit*[32] Fāris Nimr al-Kisruwānī.	Water canal used in the summer for the mulberry plantations.
4	The olives orchard known for Ilyās al-Naqqūr; #4-7 have the same location as #3 above.	'Aoudit Nimr al-Kisruwānī.	'Aoudit Ibrāhīm al-Ḥaddād.	'Aoudit al-Khūrī Iṣṭifān	'Aoudit Nimr al-Kisruwānī.
5	Eight joint *'awād*[33] known for the following: Najīb al-Naqqūr, Manṣūr al-Naqqūr, Bishāra Ṭaraf, al-Khūrī Iṣṭifān, Nimr al-Kisruwānī, his son Fāris, Ibrāhim al-Ḥaddād, and Ilyās Khalīf; and the three lots of land known for the children of Manṣūr Shāhīn al-Khūrī; all composed of lands, plantations of olives, vegetables, and mulberry, in addition to "covered homes" (*buyūt masqūfa*).	Property of Emir Salmān Sayyid Aḥmad Shihāb and Emir 'Abbās Kanj Shihāb.	Property (*milk*) of Emir Milḥim Ḥaydar Shihāb; and side by side to him, the property of Fāris Sayyid Aḥmad Shihāb.	Water canal used in the summer for the mulberry plantations.	Road and the water canal that is the property of the children of Emir Yūsuf Shihāb.

Table 6-1: 2/9

31. *'Aoudit,* pl. *'awād* (or *'wād*), was probably derived from *'ā'id* and *'ā'idah,* meaning *al-manfa'a,* or "the use of": a large land with plantations and specifically mulberry trees (*ashjār tūt*), but sometimes used also for lands without any mulberry; see, Anīs Furayḥa, *Mu'jam al-alfāz, al-'āmmiyya* (Beirut: Librairie du Liban, 1973, 1995), 122.

32. All the *'aoudit*s have the "known for..." preceding the name of the actual "possessor" and/or "proprietor" (see note above). In a way similar to *qiṭ'a* and *milk, 'aoudit* was also a private property which could be leased to tenant-farmers.

33. Plural of *'aoudit.*

#	Property[24]	North	South	East	West
6	Property known for the children of Manṣūr Shāhīn, composed of a land, mulberry and fruits plantations.	Property of Emir Milḥim Shihāb; and the road.	Property of Emir Fāris Sayyid Aḥmad Shihāb.	Property of the Emirs Qāsim and Fāris Sayyid Aḥmad Shihāb.	Property of Emir Fāris Sayyid Aḥmad Shihāb.
7	ʻAoudit known for al-Khūrī Iṣtifān; and ʻAoudit known for Najm Bāsīl; ʻAoudit known for ʻUbūr Abī Yazbek; ʻAoudit known for Manṣūr Abī Yazbek, all composed of lands, mulberry and fruits plantations, and three houses.	Road.	ʻAoudit known for Manṣūr al-Naqqūr; and the road.	Winter water canal and the road.	Property of Emir ʻAbbās Kanj Shihāb; and the ʻAoudit for the monks of Dayr Mār Antonius.
8	A set of ten ʻaoudahs known for ʻAssāf al-Jāmūs, Dhaʼīb Bishāra, Ṭannūs ʻAoukar, children of Diyāb al-ʻIbrī, Khāṭir Laḥd, Shāhīn, and the children of their brother Dhaʼīb, Jibrāʼīl Abī Jibrāʼīl and his brother Jibrāʼīl, and Manṣūr Ibrāhīm Yāghī, composed as #7 above. Located in Bourj al-Barājinah on the coast of Beirut.	Property of Emir Milḥim Shihāb.	Property of Emir ʻAbdullah Qāsim Shihāb and his sister Hind.	Road.	ʻAoudit Abī Zahrān Ḥunayn; and side by side the property of Bashīr III; and the ʻAoudit of Abī Zuhrān Ḥunayn (property of Bashīr III)[34]; two lands endowed as waqf to the poor of the Church of Mār Ilyās al-Bourj; and the property of Emir ʻAbdullah Qāsim Shihāb and his sister Hind.
9	ʻAoudit of ʻAbdullah ʻAoukar; property (*qiṭʻa*) known for Ibrāhīm al-Dhaʼīb, both composed as #7 above and same location as #8.	Property of Hind Shihāb.	Water Canal.	Road.	Property of Hind Shihāb.

Table 6-1: 3/9

34. This is a clear sign, as noted, that the ʻaoudit had a landowner and was rented by a farmer.

#	Property[24]	North	South	East	West
10	Four shops, a khān, a bakery-shop, same location as #8.	Cemetry of the Shīʿis (*matāwilah*) of Bourj al-Barājinah.	Land and olive press (property of Ammūn, wife of Bashīr III) and Emir Asʿad Qiʿdān Shihāb.	Land and olive press (property of Ammūn, wife of Bashīr III) and Emir Asʿad Qiʿdān Shihāb.	Cemetery of the Shīʿis (*matāwilah*) of Bourj al-Barājinah.
11	Four ʿaoudahs: Ibrāhīm al-Dhaʾīb and the wife of Yūnis al-Dhaʾīb; the children of Diyāb al-ʿIbrī and those of Yūsuf Abū Jibrāʾīl, composed as #7 above. Located in Khandaq Shaʿbān, part of the mazraʿas of the coast of Beirut.	Road.	Property of Emir ʿAbbās Kanj Shihāb.	Property of Emir ʿAbbās Kanj Shihāb.	Land endowed to the poor monks of Dayr Mār Antonius in Bʿabdā (property of Dāoud b. Ṭannūs Mikhāyil from the village of Ḥadath).
12	Oil press in a mazraʿa; and the lots of land side by side to each other known for the wife of Ḥannā ʿAyshī, Shāhīn Khālid and his brother Khāṭer; the children of Jirjis ʿAbbūd and the children of Dhaʾīb Khālid, composed of a land with plantations and nine homes, etc. Same location as #11.	Property of Emir ʿAbbās Kanj.	Property of Emir ʿAbbās Kanj.	Road.	Property of Emir ʿAbbās Kanj.
13	Lands known for Sāhī Khālid, Khāṭer Khālid, the children of Jirjis ʿAbbūd, Ibrāhīm al-Dhaʾīb; and the wife of Ḥannā ʿAyshī, composed similarly to the above. Same location as #11.	Property of Emir ʿAbbās Kanj.	Water Canal.	Property of Emir ʿAbbās Kanj.	Property of Emir ʿAbdullah Qāsim Shihāb; and the road.

Table 6-1: 4/9

#	Property[24]	North	South	East	West
14	Lots of land side by side known for the children of Jirjis ʿAbbūd, Shāhīn Khālid, the wife of Ḥannā ʿAyshī, the wife of Yūnis al-Dhaʾīb, the wife of ʿAbd al-Dhaʾīb,[35] Ibrāhīm al-Dhaʾīb, ʿAbdallah Abī Jibrāʾīl and his brother, Ilyās Shubayr, Kanj Wāzen, ʿAoukar and ʿAbboud Abī Yazbek, Makhkhoūl Abī Yazbek, and Ṭannūs ʿAoukar. Same location as #11.	Winter water canal; property of Emir ʿAbbās Kanj.	Water canal; olives belonging to Maronites in Beirut; property of the children of Fayyāḍ.	Road; property of Emir ʿAbdallah.	Winter water canal and the road.
15	Olives orchard known for Iliyā Abī Jibrāʾīl located in the village of Shuwayfāt in one of the mountains around Beirut.	Property of the children of Fayyāḍ.	Property of Laḥḥūd Shuqayr.	Property of the children of Shaykh Bashīr Junblāṭ.	Road.
16	Olive orchard known for Shāhīn Buṭrus aj-Juraydīnī and the children[36] of Dhaʾīb Khālid. Same location as #15.	Olives of Shuqayr.	River.	Winter water canal, and property of Shadīd aj-Juraydīnī.	Property of Abī Jibrāʾīl.
17	Olive orchard known for Dhaʾīb Khālid, located in the land of Ṣarf al-Zārūb in Shuwayfāt.	Winter water canal.	Road.	Road.	Olive orchard known for Abī Zahrān Ḥunayn which belongs to the waqf of Bashīr III.

Table 6-1: 5/9

35. It would be interesting to investigate in the few cases where lands were "rented" to women, which were overall a very small minority of cases, the role of women in "rented" properties in particular: Why did women "rent" properties and for what purposes? Were they doing business on their own, separately from their husbands or the other males in the family? Or was the pure association of their name with a particular property an inheritance from a previous male title? In this case, "rented" properties followed then the same basic rules as the *milk* in the sense that women made no "autonomous" decisions, but, at times, they were necessary tools for the transfer of property and its preservation within the boundaries of the family.

36. Children, *awlād,* should in principle denote both male and female beneficiaries. But it is not always clear from the Arabic use of the term whether the beneficiaries are males and/or females since *awlād* is neutral.

#	Property[24]	North	South	East	West
18	Olive orchard known for Rizq Abī Rizq, located in the desert of Shuwayfāt.	Property of Dāoūd Shubayr.	Road.	Property of Dāoūd Shubayr.	Road.
19	Olive orchard known for ʿAbdullah Salīm, located in Shuwayfāt.	Property of the children of Mughās al-Waqī.	Property of the children of Khalīl Thābet.	Property of the children of Shiblī Janīd al-Waqī.	Property of Ammūn, wife of Bashīr III.
20	Olive orchard of Yūsuf Abī Rizq, located in Shuwayfāt.	Orchard of Salmān Abī Faraj (property of Bashīr III).	River of Ghadīr.	Property of the children of Shadīd Wāzen.	Property of the children of Fayyāḍ.
21	Olive orchard known for Ṣaʿb ʿAoukar; and the olive orchard of the wife[37] of Ḥannā ʿIsa; olives orchard of Iliyā Abī Jibrīl; olives orchard of Shāhīn Khālid; olives orchard of the sons of Dha'īb Khālid, same location as #20.	Winter water canal.	Property of Emir ʿAbdullah Qāsim Shihāb; and property of Emir ʿAbbās Kanj Shihāb.	Olives endowed to the poor of the clergy of Dayr Mār Ḍūmiṭ al-Bawwār.	Road.
22	Olive orchard known for Asʿad Abī Ḥarb; and olive orchard of Ṣaʿb ʿAoukar, same location as #20.	Property of the children of Fayyāḍ.	Endowment for the poor clergy of Dayr Mār Doūmiṭ, and the road.		Property of Emir ʿAbbās Kanj Shihāb.
23	Olive orchards of ʿAbbūd Abī Yazbek, Ilyās Abī Ghāleb, ʿAbdullah Buṭrus, Khāṭer Khālid, and the children of Dyāb al-ʿAyrī. Same location as #20.	Property of Ammūn, wife of Bashīr III; and property of ẓarīfa, daughter of Būluṣ az-Zaghlūl.	Property of Shaykh Yūnis Yūsuf.	Property of Fāris Murād; and the road.	Property of Emir ʿAbdullah; property of Ṭannūs Iliyyā; and property of Ḥabīb Naṣṣūr.
24	Olive orchards of Ilyās Khalīfeh, Kanʿān Abī Jubrān, children of Dyāb al-ʿAyrī. Located in Ḥadath, coast of Beirut. #25-30 below have same location.	Property of Ammūn, wife of Bashīr III.	Winter water canal.	Property of Emir ʿAbbās Kanj Shihāb.	Property of Emir ʿAbbās Kanj Shihāb.

Table 6-1: 6/9

37. Women, unless from a notable's family, are usually identified with their husband's name.

#	Property[24]	North	South	East	West
25	Olive orchards of Dha'īb Bishāra and that of ʿAbbūd Abī Yazbek.	Road.	Property of Emir ʿAbdullah Qāsim Shihāb and Emir Abbās Kanj Shihāb.	Road.	Property of Emir Milḥim Shihāb and the mother of Emir ʿAbbās Kanj Shihāb.
26	Olive orchards of Ṭannūs ʿAbbūd Abī Yazbek; Ibrāhīm al-Haddād; and Dha'īb Bishāra.	Road.	Road.	Road.	Property of Emir Milḥim Shihāb and ʿAbdullah Shihāb.
27	Olive orchards of Bishāra Ṣarrāf; Ṭannūs ʿAbboud Abī Yazbek; Manṣūr Abī Yazbek; and Dha'īb Bishāra.	Road.	Property of Emir ʿAbdullah Shihāb.	Property of Emir Qāsim Salmān Shihāb.	Property of Emir Milḥim Shihāb.
28	Field (*ḥaql*) known for Bishāra Ṣarrāf.	Road.	Property of Emir ʿAbbās.	Road.	Olive orchard known for Fāris Manṣūr (see #29).
29	Olive orchard known for Fāris Manṣūr.	Road.	Property of the mother of Emir ʿAbbās Kanj.	Property of Emir ʿAbbās Kanj; Mulberry known for Bishāra Ṣarrāf.	Property of Emir ʿAbbās Kanj; and road.
30	Land known for Makhkhūl Abī Yazbek.	Road.	Winter water canal.	Road.	Property of Emir Milḥim.
31	Olive and fig orchards for Manṣūr Abī Yazbek; Makhkhūl Abī Yazbek; and the children of Dha'īb Khālid. Located in mazraʿat al-Jināḥ in the village of Ḥadath on the coast of Beirut.	Property of Bashīr III.	Property of Bashīr III.	Property of Bashīr III.	Road.
32	Lots of lands with plantations and built-in areas and six "houses." Same location as #31.	Property of Emir Milḥim and Saʿīd Bek Junblāṭ.	Property of Jirjis al-ʿAshshī.	Property of Emir Darwīsh Ḥasan Shihāb.	Property of Saʿīd Bek Junblāṭ and Bashīr III.[38]

Table 6-1: 7/9

38. It is not clear when the property in question is identified with two distinct names, especially as is the case above in which two names from politically rival families—the Shihābs and Junblāṭs—whether it was a "joint" property or two distinct properties with different owners. The repetition of *milk* twice might be a sign that we are indeed with two different properties: "the milk of the Emir Milḥim and the property of Saʿīd Bek Junblāṭ..."

#	Property[24]	North	South	East	West
33	Land with plantations of Makhkhūl Abī Yazbek. #33-45 located in Ḥadath.	Property of Emir Milḥim Manṣūr.	Property of Emir Milḥim Manṣūr.	Property of Emir Milḥim Manṣūr and that of Emir Aḥmad Salmān.	Property of Emir Milḥim Manṣūr.
34	Land with two homes of Makhkhūl Abī Yazbek.	Property of Emir Aḥmad Salmān.	Property of Emir Milḥim Manṣūr.	Property of Emir Aḥmad Salmān.	Property of Emir Milḥim Manṣūr and that of Emir Aḥmad Salmān.
35	Homes (*buyūt*) known for ʿAbboud Abī Yazbek and Bishāra Ṣarrāf; lots of planted lands; and a shop (*dukkān*).	Property of Emir ʿAbdullah.	Road.	Road.	Property of Emir Milḥim and that of ʿAbbās Kanj.
36	Homes of Dha'īb Bishāra and their lots of lands with plantations, etc.	Property of Emir Qāsim Salmān.	Property of Emir Fāris Sayyid Aḥmad Shihāb.	Property of Emir Qāsim Salmān.	Property of Emir Fāris and Emir Milḥim.
37	Land of Ilyās Abī Smāḥ.	Property of Ḥannā Abī Ṣāleh.	Property of ʿAbbās b. Mikhāyil al-Khūrī and that of Fāris b. Anṭūn Abī Yazbek; and property of the children of Nāṣīf al-Makkārī.		Road.
38	Land known for Ḥārat Ilyās Māḍī containing plantations, etc.	Property of Emir Fāris and that of Bishāra Murʿī.	Property of Emir Milḥim.		Property of Emir Milḥim; and the five shops property of Bashīr III (see #39).
39	Five contiguous shops and their other parts, etc.	Road.	Property of Emir Milḥim.	The mulberry part of this waqf.	Property of Emir Milḥim.
40	Lots of lands and their parts known for Fāris Manṣūr Shāhīn, Ṭannūs ʿAbboud Abī Yazbek, and al-Khūrī Isṭifān al-ʿAlam.	Property of Bishāra and property of Dāoūd b. Ṭannoūs Mikhāyil.	Road.	Property of Emir Fāris and that of Bishāra Murʿī.	Shops of Emir ʿAbdullah, and the road.

Table 6-1: 8/9

#	Property[24]	North	South	East	West
41	Lots of lands with plantations, etc., known for Najm Bāsīl and Manṣūr Yāghī.	Road.	Property of Emir ʻAbbās Kanj and that[39] of Emir Fāris Sayyid Aḥmad.	Road.	Road.
42	Land known for Manṣūr Yāghī and Najm Bāsīl.	Property of Emir ʻAbdullah.	Property of Emir Milḥim and Emir Fāris;[40] and the land for the church of Ḥadath.	Property of Emir Milḥim; and a land with olive plantations known for Asʻad Khūrī (see #43).	Road.
43	Land known for Asʻad Khūrī.	Property of the Emirs Salmān and ʻAbdullah.	Property of Emir Milḥim.	Property of Emir Milḥim.	Part of the present waqf.
44	Land known for Manṣūr Abī Yazbek; land known for Dhaʼīb Bishāra; and land known for Ilyās Khalīfeh.	Winter water canal.	Part of the waqf of Bashīr III; and property of Emir ʻAbdullah.	ʻAoudit of the children of Ṣaʻb Ibrāhīm.	Land for the church of Mār Antonius.
45	Land known for ʻAbboud Abī Yazbek.	Property of Emir Milḥim.	Road.	Property of Emir Milḥim.	Road.

Table 6-1: 9/9

39. The "that," meaning "property," denotes what seems to be in the original draft a distinct property from the first one(s) already identified.

40. The "and" denotes what seems to be in the original draft a "joint" property with the first name(s) already identified.

Table 6-2
Waqf of Bashīr III (2) (C 6-1)

#	Property	North	South	East	West
1	Mazraʿat Sibnāh on the coast of south Beirut, known for Bashīr III, includes a land which is partly cultivated and another non-cultivated part (*arḍ salīkh*), with mulberry and olive plantations, among others; also includes the home (*dār*) of Bashīr III. However, the following are not included in the property of Bashīr III: home known for the children of Emir Asʿad Ḥammūr; home known for Manṣūr al-Jāmātī; home of the mother of Bashīr III; home property of the children of Būluṣ al-Zaghlūl.	Milk of Emir Milḥim Ḥaydar Shihāb; and land devoted to the poor of the monks of Dayr Mār Anṭonius in Bʿabdā.	Road.	Milk Emir Milḥim.	Milk Emir Darwīsh b. Ḥasan Shihāb.
2	Non-cultivated land located south of #1 above.	Trench (*khandaq*) of Emir Darwīsh.	Milk of Ghālib Faraḥ and the sons of ʿAbbūd al-Barbārī.	Non-cultivated land (*arḍ salīkh*), milk of Emir Milḥim.	Road, and fig orchard milk of Rāshid Yaqqūʿ and Niqūlā Janḥū.
3	Fig orchard part of the above mazraʿa.	Milk Ibrāhīm al-Ḥawwār.	Milk of Ghālib Faraḥ.	Milk of the sons ʿAbbūd.	Land of the aforementioned mazraʿa.
4	Non-cultivated land part of the above mazraʿa and located above the water-canal.	Milk of Shaykh Yūnis Yūsuf Naffāʿ.	Water-canal.	Milk Ibrāhīm al-Ḥawwār.	Milk Ghālib al-Muḥarrar.
5	Land containing plantations of olive and fig, part of the above mazraʿa.	Mazraʿa in #1.	Mazraʿa.	Mazraʿa.	Milk of the sons of Kanʿān Abī Shurfān and Fāris ʿAwwād, located west of the mazraʿa.
6	Land containing olive plantations, located west of the mazraʿa.	Mashāyikh of Banū Junblāṭ.	Mazraʿa.	Mazraʿa.	Milk of the sons of Kanʿān.

Chapter 7
Fatwas at the rescue of hard cases

All four cases examined in detail thus far in the two previous chapters (three related to the Shihābs, in addition to a regular Beirut case similar in its structure to that of Bashīr III) reveal an eagerness to go beyond the limitations imposed by both Maronite canon law and Ḥanafī practice. But a great deal of conservatism also reveals itself in that the court procedures, which by and large consisted of legal subterfuges, did not touch upon the substance of the law. However, even with the extra-Ḥanafī adjudication with which historians claim that it was exercised by Druze, Maronite, and Shī'ī judges at their own discretion and without much interference from the shar'ī authorities in Beirut or Sidon, or the Ottoman authorities for that matter (even though not much evidence remains as to the informal proceedings of all those religious courts),[1] the societies of Mount Lebanon, even though more advanced than their counterparts in Greater Syria, were nevertheless kept within the boundaries of an austere Ḥanafī régime, even when considerable property transfers were at stake or when debts had to be negotiated (C 3-1). That however did not prove to be beneficial in particular for societies whose relations and mode of production were ahead of their time. For one, the Lebanese ruling factions of the Mountain were living in proximity to their peasants, clergy, and other common people. That inevitably led to a better protected peasantry, one that could at least impose more challenging contractual settlements with its nobility. For another, that proximity inevitably led to a better integration not only among the ruling factions, whether Druze or Maronite, but also between the latter and the common people, not to mention the decisive role of the Maronite Church in acting as an intermediary between the nobility and peasantry. But all that neither led to judicial nor significant bureaucratic reforms, and Mount

1. Riyad Ghannām, *Muqāṭa'āt Jabal Lubnān fi-l-qarn al-tāsi' 'ashar* (Beirut: Bīsān, 2000), Chapter 6.

Lebanon had to wait for its own Tanẓīmāt with the rest of the empire. And even the legal devices that the Beirut courts were in need of to handle some of their most demanding cases had nothing peculiar to them since they shared many of the qualities of those in Damascus.

Since our aim is the study of discourses related to the practices of judicial decision-making, the procedural fictions in the previous chapters proved beneficial for a variety of interrelated reasons. For one, it can be hardly claimed that they did contribute in any ambitious policy-making process. That could have happened had the courts bypassed their role of traditional adjudication, and instead pushed for new contractual forms and notions of property and its possession. Instead, the courts cantingly constructed a discourse based on the traditional Ḥanafī hands-on (*waḍʿ yad,* "occupation") and hands-off (*rafʿ yad*) notions, and incorporated them into a set of procedures that helped granting property titles to individuals and families with a history of land occupation. Indeed, it has often been noted that the *waḍʿ yad* notion in particular and sharecropping practices such as the *muzāraʿa* and *musāqāt* have greatly contributed in fragmenting large properties and in encouraging small ownership.[2] But despite all those court and social practices, and their impact on society well before the 1858 Land Code (even though it would be immature to claim that their aim was similar), it could be hardly claimed that the sharīʿa courts were involved, in a way similar to the regional councils, in a policy-making process out of which new contractual notions emerged that pushed towards an open acknowledgement of all those "occupied" properties and restored their legitimate titleholders. To do so would imply that fictitious litigations, as examined in the previous chapters, were concealed policy-making devices out of which emerged notions of contract and land ownership, or that they constituted a de facto pre-1858 Land Code out of which the real historical one emerged.

To understand how such procedural fictions effectively worked, one needs to look at their discursive constructions, to discern their real conservative nature. As pointed out in Chapter 2, the written document only serves as a tool for memorization, hence the sharīʿa documents were only a material support for a number of facts that hade received their validation in a qāḍī's courtroom.[3] Fictitious litigations have considerably made use of those verbal transactions in need of some material support and the like, and that was precisely what those litigations served for: hundreds of properties exchanged hands between

2. Ghannām, *Muqāṭaʿāt,* 20, 31.

3. Lawrence Rosen, *The Justice of Islam* (Oxford: Oxford University Press, 2000), 5: "From the point of view of classical Islamic legal theory, documents are regarded simply as written reminders of individual witnesses' statements, reminders that will serve to recall their testimony in any future dispute."

members of the same family (usually between different generations), then had their status validated in court, and finally received a hard-to-revoke judge's ruling. The point here is whether it was possible for the courts to have created a set of procedures, and hence by implication added to the existing legal doctrine, so as to avoid the kind of tortuous fictitious litigations as we have come to know them. Was that possible at all, and did the fictitious litigation add to the existing corpus of legal doctrine? Could all that process have been handled more explicitly?

Procedural fictions were primarily concerned with validation: how to validate an old verbal transaction in order to maintain its evidentiary role, and more importantly, how to validate the transfer of a title-ownership. The form of validation is here crucial since it implies first creating a procedure for that purpose, and then, secondly, transforming the oral utterances into their equivalent written support. In the majority of the cases presented thus far and in the ones to come, transactions were introduced as having been orally completed, and their validation was through a process of witnessing and oath-taking. In most of them, whether on the plaintiff or defendant side, proof of a transaction, ownership, legal or illegal possession or occupation were all taken care of by means of witnessing and oath-taking. The fact that the burden of proof could have shifted from plaintiff to defendant was mostly a situational factor: In whose hands will the property end up, plaintiff or defendant? Since in fictitious litigations the assumption is that indeed the matter has been settled beforehand, the defendant will have to validate his legal ownership in front of a clueless plaintiff if the property will become his thanks to a judge's ruling, and vice versa.

Since facts have been validated through witnessing and oath-taking,[4] a case will be framed (or narrated, if one is to believe that a legal case is primarily based on narration) by means of prior opinions, analogic reasoning, and legal subterfuges, some of which, as noted in the case of Bashīr III (C 6-1), might originate right from the fiqh or fatāwā manuals (see Chapter 6 *supra*). Thus, there is overall very little room, if any at all, for deductive reasoning *per se,* one that might necessitate a more thorough logical reasoning. As Malcolm Feeley and Edward Rubin have noted regarding the American decision-making process, "A notable feature of both analogy and metaphor, as opposed to deductive reasoning, is that they produce fully realized ideas."[5] And that

4. Rosen, *Justice,* 10: "The burden of oath-taking is not consistently placed on either the plaintiff or the defendant in the case, and indeed the burden may shift within any one proceeding, depending on the subject matter involved in the oath."

5. Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State* (New York: Cambridge University Press, 1999), 237.

was precisely the purpose of procedural fictions: to produce fully realized ideas, so that by means of old opinions, analogy, metaphor, legal devices, and doctrine, a patchwork is constructed that would not push the judiciary into indeterminate decision making, which might verge on the political. As I will argue in Chapter 9, that was left to the regional councils, whose rulings did not require the Ḥanafī juristic typology.

In this chapter, our last two Shihābī cases are very different from the previous three (C 5-1, 5-2 & 6-1) in that they are not fictitious (C 3-1 seems for all intents and purposes "genuine"). The difference that it poses will be pretty obvious, especially in the way the disputants challenge each other's assertions and seek validation more thoroughly, and how the process of finding and constructing opinions ends up being more tortuous, being the subject of so many contingencies, including unpredictable behavior displayed by the litigants. So let's begin with the simplest of the two cases first, with a preliminary digression regarding the dichotomy of "public" versus "private" property.

Unlawful usurpation and property restitution

Ḥanafī jurists of the late Mamlūk and early Ottoman periods, faced with the prospects of "private" properties becoming state-owned, created a few images of public ownership, but it all coalesces in the image of the sultan who "owns" the lands of his empire. Ibn Nujaym's legal fiction is in particular striking in the way it juxtaposes different metaphors. The problem, let us recall, was to account for the massive ownership of lands by the state, a phenomenon that made some legal notions of classical Islamic law sound obsolete. Ibn Nujaym, basing himself on an analogy already made by his predecessor Ibn al-Humām (d. 861/1457) in *Fatḥ al-qadīr,* compares the sultan (or imām) to the guardian (*waṣī*) who has to take care of orphan "minors" (*qāṣir,* pl. *qāṣirūn*)—that is, in this case, the *ra'āyā*—regarding their safety, daily life, and properties. Ḥanafī practice, Ibn Nujaym notes in his *risāla,* stipulates that guardianship entails that full freedom be granted to the guardian to do whatever necessary with the properties of the minor so that they be handed back to him in an even better condition once he becomes mature. Thus, a property (*'aqār*) is eligible for a transaction if it can be sold for twice its price; or when its provisions (*ma'ūnah*) are almost equal to its produce; or when the orphan's expenses are more than what the property itself could cover from its produce; all such factors could push a guardian in deciding to sell a property in favor of a better and more promising arrangement. In one of our Shihābī cases (C 5-2), Bashīr II acted as guardian to his nephew 'Abdullah, and in order to cover the

debts of his deceased brother in such a way as to avoid hurting the still minor ʻAbdullah Shihāb, he sold his brother's properties and then bought them all for himself, while placing the equivalent in cash in his nephew's account. The crucial point here is that this legal technique of selling a property and then buying it for one's self became a procedure that could be used by anyone, that is, any subject of the empire up to the sultan himself. In fact, what Ibn Nujaym was interested in was a legal procedure that would account for the sultan's ownership of large *domanial* lands. The argument goes on as follows. First, the imām was acting like a guardian who was taking care of "minors," that is, the *raʻāyā:* the implication here is that *originally kharājī* lands were not owned by the imām but by the people; since he was their guardian, he had to act in such a way that fits best with their interests and happiness. Second, within the canonical logic of guardianship, the imām sells those *kharājī* lands (which are not yet his "own") and then buys them for himself; Ibn Nujaym makes the point that the act of buying must be completed by proxy: "He orders someone else to sell [the *kharājī* land] and them buys it all from him to himself;" but no explanation is provided as to why an intermediary should get involved. Quite probably, however, this could have been a legal device to ascertain that the acts of selling *and* buying effectively took place separately, that is, they are not combined into a single act but indeed *separate* (in the case of Bashīr II, an intermediary did the selling before the Emir purchased the properties all to himself). Third, this explains how *"privately" owned kharāj lands became state owned;* an explanation is still needed, however, to account for the imām selling (by proxy) these properties and then buying them for himself: What was his excuse? The main reason provided by Ibn Nujaym is that the original proprietor of the *kharāj* land died without any heir; had an heir survived, he would still be responsible for paying the *kharāj* to *bayt al-māl,* and even a minor heir would still have to pay the *kharāj.* But once a property was left without any heir, it becomes ipso facto the ownership of *bayt al-māl,* and, "if the imām sells something from *bayt al-māl,* such a selling is valid." So the imām sold all those privately owned *kharāj* properties which were left without heirs and then purchased them all to himself. This accounts, according to Ibn Nujaym, for the large number of state-owned properties that became part of the Ottoman *mīrī* system.

The arguments in Ibn Nujaym's short *risāla* ("al-Tuḥfa al-murḍiyya fī-l-arāḍī al-Miṣriyya") are more subtle and complex than the summary provided thus far, but I deliberately left them at their lowest denominator to keep track of the main arguments.[6] What is of interest to us, however, is to see how such

6. See Chapter 4 for a more complete discussion.

opinions might explain some of the sharī'a courts procedures. The logic of some of the courts' procedures dictates specific notions of property—such as ownership, possession and occupation, transfer, and rights of buying and selling. Thus, the arguments provided by Ibn Nujaym could be reordered for the purpose of making the concept of property easier to grasp. First, the imām (or sultan) did indeed enjoy higher rights and duties than anyone else of the ruling class or the *ra'āyā,* but such rights did not place the imām beyond accountability for his personal (hence private) ownership; in other words, "ownership" was not protected by a divine or natural right: an *explanation* was needed to account for everything the imām owned. Second, it was the act—or contract—of buying and selling that established the right of "ownership," even if that meant the tautological action of buying and selling from one's own properties.

There were various notions of property and contract that covered anything from land to marriage: Did they have anything in common? Was there a general law of property or contract? Or did those notions of property and contract simply pragmatically add up to different situations? What complicates further the task of searching for more general notions is that those multiple notions could even produce greater variations in the practices of the courts: that was definitely the case for contracts, and, as already discussed in Chapter 3, a set of contractual arrangements emerged in the court system whose primary aim was to extend leases, delay payments, and provide the tenant with a sense of "ownership" by transforming him into a de facto "owner"; all of which self-corrects a rigid law of contract without, however, ever attacking its substance. The law of property was within a similar range. If we begin with what the fiqh acknowledges as the two basic forms of property, *tamlīk al-'ayn* and *tamlīk al-manfa'a,* the ownership of the object itself and that of the usufruct, we soon come to realize that the occupation-possession (*waḍ' yad*) of a property was what gave the courts the leverage they needed to create situations in which formal ownership was acknowledged for furnishing evidence of occupation (normally through a procedural fiction). Moreover, considering the large amount of abandoned and state-owned mīrī lands, not to mention all properties that have shifted hands so many times to the point that their status has become uncertain, the law had to be flexible when it came to legalizing all "illegal" occupancies—a sort of adverse possession but without all the statutory conditions that would limit occupancy to a time framework.

All possession-occupation cases encountered thus far were structured through procedural fiction, and we have discussed at length of what such a form consists: unchallenged narratives that receive the form of their narration from a set of Ḥanafī opinions, using label, analogy, and metaphor. Our problem now consists in identifying *waḍ' yad* cases which are structured differently: Does

the different restructuring necessarily imply a non-fictitious—"genuine"—litigation? In most cases (as the ones below), it indeed does.

[C 7-1] One of those cases, whose hearing took place in Beirut on February 20, 1848, is another *waḍ' yad* litigation.[7] The plaintiff was Emir Milḥim b. Qāsim b. Bashīr II Shihāb (hence a grandson of the ex-ruler) whose representative was Ḍūmiṭ Mu'awwaḍ from Shiyyāḥ[8] (two witnesses validated the act of representation). The defendant, Buṭrus b. Ṭannūs al-Aṣghar, was accused of illegally possessing one of the emir's properties, an orchard (*bustān*) located in the vicinity of Beirut.[9] When prompted by the judge whether he was effectively in "possession" of the orchard, he acknowledged that in fact he had exercised his right of *waḍ' wad* ("occupancy") for three years, more specifically since he purchased the property from the plaintiff's father, Emir Qāsim Shihāb, for the sum of 21,400 piasters. But the plaintiff's representative denied that his client's father could have made such a transaction since he had no *wikāla* ("representation") that would have provided him with the legal authority to proceed independently on his own with the property; but upon the defendant's denial and insistence on his previous statements, the representative was requested to furnish evidence, and thus brought two witnesses. The first one testified that the plaintiff's father had acknowledged that the aforementioned property was the sole ownership (*milk*) of his son Milḥim, and that he, Qāsim Shihāb, enjoys no right in it; and still according to this first witness, that this confession from the part of the plaintiff's father took place prior to the defendant purchasing the property, who knew about it. (This constitutes an indirect acknowledgment that the property might have—or was indeed—purchased by the defendant; otherwise what is "[the defendant] knew about it" supposed to mean? Other than "he knew about it" but still managed to buy it? And if so, how did Qāsim Shihāb, *at the same time,* certify to the witness that the property was that of his son *and* then sold it to the defendant?)

The second witness, the qāḍī of the Greek-Catholics, was a "secondary witness," *shāhid fur' 'an aṣl ghāyib,* meaning a proxy witness who in this case came in lieu of Emir 'Abdullah b. Ḥasan Shihāb. The original witness, who

7. Beirut sharī'a courts, unnumbered register and pages, 15 Rabī' I 1264 (February 20, 1848).

8. Within the confines of the southern "suburbs" of Beirut where the Shihābs had many of their properties with olive and mulberry plantations (for example, supra, Tables 6-1 & 6-2).

9. The property is described as follows: it was part of *bustān* Qiqānū, located south-east of *mazra'at* al-Boushriyyeh in the vicinity of Beirut, and contains a land with plantations, mulberry trees, wild trees (*barrī*), some built areas (*'amār*) with ceilings, wooden materials, stairs, a home, etc. Location: south-east of the water-canal of Boushriyyeh; the complementary part of the orchard was located north-west and was owned by Mikhāyil Bārid.

could not come to court because he was located "in Kisruwān which is over seven hours away from the majlis [of the court]," was a nephew of Bashīr II and a paternal cousin to the plaintiff. The proxy witness reiterated verbatim the first witness' statements with, again, the following concluding remark: "The acknowledgment (*iqrār*) [from Emir Qāsim on his son's ownership] was prior to the defendant buying the property; and he had full knowledge of that." Then two additional witnesses corroborated the statements of another absent and sick *fur'* who in turn should have had given his testimony in lieu of an absent *aṣl*. Finally, the judge having accepted all testimonies, declared the property the legitimate ownership of Emir Milḥim and requested from the defendant to forgo the rights of his ownership (*raf' milk-i-hi*) and that he should be refunded by the heirs of Emir Qāsim the sum he paid to buy the land three years ago.

What is of interest to us is that, unlike our other cases, this property was effectively purchased by the defendant for an interim three-year period for 21,400 piasters and a court's order came to revoke that purchase as illegal. This might sound obvious had the defendant either illegally "possessed" the property (a classical form of *waḍ' yad* we have already encountered) or had he purchased it "illegally" (either as *fāsid* or *bāṭil*). In fact, as it turned out, the defendant had purchased the property from Emir Qāsim, the father of the plaintiff, even though he knew, according to the plaintiff's witnesses, that Qāsim had declared the property to be his son's ownership. Since Qāsim died in 1846, the purchase, which was also acknowledged by the plaintiff's witnesses, must have taken place only the year prior to his death, while the plaintiff maintained that "his father had no right to sell the property since he had no prior mandate (*wakāla*) to do so and no authorization (*ijāza*) either." It thus remains to be seen how a property was sold by someone who neither owned it himself nor had any official mandate nor authorization to act in proxy: So why did Qāsim Shihāb sell that property? Did he do it on behalf of his son? And why did the defendant buy a property whose status was left unsettled? Furthermore, the defendant did not present the court with any written *ḥujja* or witnesses for that matter: on what basis did he then pay the 21,400 piasters over which the judge ruled that they should be given back to him? Was he ambushed by the Shihābs?

There are two possibilities here: either the whole case was genuine and a purchase of property from Emir Qāsim in 1845 did effectively take place; or else it is one of those fictitious litigations, albeit in a form different from what we have been accustomed to, which needs to be read thin a different order and subtext from the one presented to us. The purpose of the lawsuit could then have been, say, to establish that Emir Milḥim b. Qāsim was indeed the "owner" of a property which, for some reason, had a confused status, and the

defendant was brought in and reimbursed what he had originally invested to forgo his alleged property rights. The first possibility, however, seems more likely, and could overlap with our second hypothesis if the disputants decided outside the court for a peaceful settlement. So, in both cases, the most likely scenario looks as follows: Qāsim sold the property to the defendant despite the fact that it wasn't his in the first place, and for this reason it was never ratified through a written *ḥujja;* then, three years later, the plaintiff, with the help of several witnesses, disapproves the selling for which his father was responsible.

That was a simple case despite the fact that it remains far from clear why and how the property was sold in the first place. But whatever the reasons, the case follows a general pattern which was common to Mount Lebanon and persisted in sharī'a courts protecting aggrieved landholders and deprived heirs. Moreover, the restored property holding gets a judge's ruling and all the orally presented evidence has now received a written support. Thus, this case is another wrongful dispossession: the plaintiff was dispossessed of his property because of an ill-fated action by his now deceased father.

How fatwas work

The previous case (C 7-1) was simple enough so as not to necessitate anything more than two witnesses furnished by the plaintiff, both of which transmitted to the court the now deceased plaintiff's father oral utterance regarding the past status of the disputed property. Even though the defendant had fully paid his dues, the case was classified as one of illegal possession: it was illegal because of the original action of the plaintiff's father, not because of any wrongdoing by the defendant. But the latter became responsible for the plaintiff's father action simply because he *knew* that the offer was not based on any legal status. It was therefore with an assumption of the defendant's knowledge that the court ruled in favor of the plaintiff, albeit on the condition that he fully refunds his opponent. Moreover, whether there was a pre-settlement or not, the case is very different from previous "illegal possession" litigations. First, the transaction sum was fully paid, and then refunded three years later at the request of the judge. The euphemism "property X was bought for a well known sum," which remains unknown, and which only serves as a procedural fiction, is here reversed: the fact that the date and amount of the transaction have been fully identified by both sides is enough indication of the non-fictitious nature of that litigation, even if it turns out—and that's impossible to confirm—that the whole case was an outcome of a pre-settlement. Second, legal subterfuges were not needed: an illegal possession must end, and that was basically it.

By what kind of reasoning did the judge rule for the plaintiff? The non-stated assumptions of the ruling go as follows: 1) The seller of a property must either enjoy absolute ownership, or else be the legal representative of its owner. 2) The seller in that case lied about his status vis-à-vis the property. 3) The orally completed transaction is therefore null and void. 4) The buyer-defendant must therefore restore the property, only to be reimbursed for the sum of its initial purchase. What kind of legal reasoning did that represent? While the first statement is based on well known Ḥanafī opinions (in fact, so well known that they need not be quoted), the remaining three (2-4) follow deductively from the first. But the main assumption remains in relation to the general status of private property. Since "private" only came in association with several other quasi-"ownership" notions—from the licit and illicit "occupation" up to "possession" and full *milk,* not to mention the waqf—in our case here (C 7-1), "ownership" becomes restricted to its original meaning of inalienable rights.

Yet, as the following case will show, not all illegal possession cases, or at least those presented as such, are that clear and simple. Complications could arise either because the possession is denied, or due to lack of evidence (meaning reliable witnesses), or the reliability of one or all witnesses has been challenged, or simply because the other party failed to show up at the moment of the ruling, any such problem could push for a muftī's fatwā, which all by itself adds another complication.

[C 7-2] In this case, whose hearing took place in Beirut on May 12, 1843,[10] the defendants, the two brothers Dawūd and ʿAssāf b. Qāsim al-Zayn, Qāsim Idrīs, and Ḥusayn Mūsa, all appointed Qāsim b. Ḥājj Ibrāhīm al-Siblīnī as their representative in court for their litigation with Emir Milḥim b. Ḥaydar al-Shihābī. The act of representation was certified by two witnesses, the *ʿālim* Muḥyī al-Dīn Efendi al-Bakrī al-Yāfī and Muṣṭafa Qurunful who, in turn, acted as representative on behalf of Ḥammūd al-Zayn, the fifth defendant. Qurunful's right of representation, also against the Shihābī Emir, was certified by two of the other defendants (and at the same time witnesses), ʿAssāf [al-Zayn?] and Qāsim Idrīs; and finally, the judge also approved all the intricacies of representation. Did the fact that one of the witnesses was also representative to the fifth defendant, while that same representative had two of the defendants confirming his right of representation, pose any conflict of interests? Apparently not to the judge who even did not bother to pose the question and instead proceeded with the hearings. Defendants, representatives, and witnesses shifted roles as long as their status had been

10. Beirut sharīʿa courts, unnumbered register and pages, case dated 12 Rabīʿ II 1259 (May 12, 1843).

established as such by reliable people, in the same way that oath-taking could shift from plaintiff to defendant depending on how the burden of proof shifts sides during the procedures. For our purposes here, suffice it to note that even though two of the defendants acted already as witnesses on behalf of one of the two representatives, the latter was not their representative, but that of the fifth defendant.

As to the Emir, who initiated the lawsuit as plaintiff, he was represented by Shaykh Bishāra Khūrī (whose right to represent was legally justified, in the *shar'*, but no witnesses confirmed it: no need of witnesses when a judge accepts the representative?). The litigation was, according to the plaintiff, over two disputed farms, the first, *mazra'at* al-Duwayr, located in *muqāṭa'at* Bilād Jubayl (located mid-way between the coastal cities of Beirut and Tripoli), which the Emir had inherited from his father, and it contained lands some without any plantations (*salīkh*), while others had mulberry trees, fruits, and other types of plantations, and some buildings (*'amār*) as well.[11] The other farm, *mazra'at* Jalab, was also in the same location and composed of similar elements as the first.[12] The plaintiff's representative made the claim that the Emir was, as his father prior to him, in "possession" (*mutaṣarrif*) of the two farms for a period of over fifty years, and it was only this past year (1842/3) that the defendants had their hands-on (*waḍ' yad*) over the two farms illegally by usurpation (*bi-ṭarīq al-ghaṣb*).

When asked about the incident, the defendants' representatives responded that their clients owned the two farms fully as *milk,* and that it was the plaintiff's father and uncle, Emirs Ḥaydar and Yūsuf Shihāb, who illegally took it by force in an act of *ghaṣb,* right after the death Zaynab bt. Mur'ī, mother of one of the defendants, who was in full "possession" (*waḍ' yad*) of the farms. When Emir Yūsuf died, his brother, the plaintiff's father, kept the illegal "possession" for himself, and upon the death of Emir Ḥaydar, the "possession" was transmitted to the plaintiff himself; all within a time-span of fifty years. The defendants further claimed that within this fifty-year period, they felt uneasy about the possibility of a lawsuit "because the Shihābs were in power and everyone feared their might (*kānū dhawī shawkah wa ghalaba yukhāfu minhum*)."

The plaintiff's representative, having rejected the defendants' allegations, the qāḍī pushed the other party for some "evidence" (*bayyina*). The reason why evidence was summoned from the defendants only rather than the

11. Specific location: north: land of Mu'aytiq; south: *rizq* Bayt al-Būm (*rizq* refers to what this "house" (*bayt*) of Būm were "surviving from"; there is no further specification as to what this *rizq* consists of); east: *Ẓahr* [land?] *al-Sīrān;* west: road.

12. Specific location: north: river; south: land of al-Ḥarf; east: *bi-'āliyatihi* (?); west: lands of Sīrān.

plaintiff was that the former acknowledged their *actual* "possession" of the two farms; thus, while the plaintiff was contesting that right of possession, the defendants had to prove that it was legal. Because the burden of proof was on the side of the defense, the defendants had also to establish the legitimacy of their representatives (confirmed by two witnesses) while such a step was unnecessary for the plaintiff. But why was the burden of proof on the side of the defense? Why wasn't the plaintiff requested to prove that he and his father owned the two farms? Doesn't a well known rule (originally a ḥadīth?) in force since the early times of Islam explicitly request that "evidence should be provided by the plaintiff, and oath is on who denies (*al-bayyina 'ala man idda'a wa-l-yamīn 'ala man ankara*)"? The opposite is here the rule: the plaintiff only throws allegations about the status of his property without any formal evidence, claims that it was violated by the defendants, while the latter had to prove that they occupied it legally. The reasoning might well be that since the defendants openly admitted that they forced their way, *within the last year or so,* over the two farms that were in the "possession" of the Emir (and earlier by his father), that because that was openly acknowledged as such, they had to prove the legality of their act by proving that the two farms were *originally* theirs.

Since witnessing is also a form of evidence, the defense managed with two witnesses. The first, who repeated verbatim (*karrara*) what the defense had already stated, had his testimony accepted "in its spirit (form) and essence (*lafẓ-an wa ma'na-n*)"; the second was less fortunate and had his testimony rejected (*ruddat shahādatuhu*) because "it did not meet the proper conditions for accepting testimonies (*lam tuqbal li-'adam istīfā'ihā sharāyiṭ al-qubūl*)." The text, however, does not bother to explicate what those conditions were and which criteria the testimony could not meet. It doesn't say either *who* rejected the testimony: was it the qāḍī who discovered its legal weaknesses? or was it the plaintiff? or was it related to the social identity (*nisba*) or personality of the witness himself? In general, the *specific* grounds for accepting or rejecting testimonies is seldom fully explicated: Was the oath the main criteria for accepting? Certainly not, since the second witness took oath too but that did not save his testimony. Or was it the "acceptance" of the testimony by the other party? What is of interest to us here is less what the reasons for rejecting this testimony *might* have been, than to understand the reasons for their nonexistence in the text itself. In other words, we know more about the system from what *it fails to tell "us"*—even though the nature of such texts excludes beforehand posthumous "readers"—than from what it reveals to itself, the social actors, and indirectly "us," that is, today's readers. The truth of the matter is that the system did not care much about what witnesses ostensibly said, that is, the *content* of their statements. Besides which, witnesses were

never cross-examined, their statements were only a *repetition* of their own parties' statements, and hence it all boiled down to status and rank.

The court's rejection of one of the two testimonies pushed the plaintiff's representative for a plea to accept his client's views and rule in his favor.

> The plaintiff's representative, Shaykh Bishāra, thus pleaded [*dafa'a*] a legal plea [*daf'-an shar'i-yan*] and claimed that the aforementioned people [*jamā'a*], "I mean, all those who are represented [by the defense], have proved [*aqarra*] and confessed [*i'tarafa*] that those two farms are the property [*milk*] of my client, Emir Milḥim, and that they have no right, no law-suit, and no claim in it."[13]

Even though the text was drafted in an anonymous third-person singular to the point that the judge himself was referred to as "*mawlānā al-qāḍī*" or simply as "al-qāḍī," the shift to the first-person singular, whenever one of the disputants, their representatives, or witnesses, is performing an utterance, does not weaken (or distract from) the overall style and texture in trying to establish an *authority of the text.* The text attempts to reinforce that authority further by including "factual elements" such as the lists of properties and their location or utterances from the parties in conflict. A couple of cautionary remarks: First, "factual" is not to be taken here in the modern sense of an objectively tested fact, one whose actual happening has been confirmed and accepted as such by more than one observer. So that neither the list of properties, which are the most "factual" element in the text, nor the utterances of the judge, disputants, and their witnesses, are there for their reliable *content:* they simply have been accepted or rejected for what they represent, namely as utterances whose truth-value has not been challenged rather than, say, empirically verified. In short, it was the preempirical nature of all such utterances that gave way to a ruling.

Second, not all utterances were "quoted" in the first person since few were, like the rest of the text, integrated in an anonymous third-person texture. It is beside the point to see whether such statements were in fact uttered, and if so, whether they were "quoted" verbatim. The point here is to analyze the *strategy of the text:* when and why "it" decides to move from one grammatical mode to another. In this case, and this proves to be a common strategy in court documents, the constant shift from the third- to the first-person singular creates a strategy of distance and "otherness," which helps in establishing an outside authority to the text. The construction of a textual authority helps in distancing the subjective author from his own text.

13. Since the original text comes with no signs of punctuation at all, I have added quotation marks whenever necessary to make more manifest the shift between the anonymous third-person and the first-person singular in the plaintiff's representative utterances.

Thirdly, Ḥanafīs understand a *ḥāditha,* "event," as a unique happening that would provide enough justification for the judge to begin a hearing. Similarly, a *ḥāditha* could trigger a muftī's fatwā and thus become one of those numerous *ḥādithat al-fatwā* used for future reference by jurists and muftīs alike as "precedent." In other words, adjudication, whether from a jurist, muftī, or judge, ought to be primarily concerned with a unique enough event, one which has no immediately visible textual precedent.

The defendants' representative refuses to accept that he had acknowledged the Emir's rights over the two farms, while the judge pushes the other party for further evidence. The Emir's representative brings two witnesses who reproduce verbatim the plaintiff's view, and even though their testimony was approved, it was nevertheless contested (*ṭa'ana*) by the defense on the basis that one of the two witnesses (kept unidentified) was bribed (*shahida bi-l-ujra*). The judge then requests the defense to furnish evidence for challenging one of the plaintiff's witnesses, and a month elapses in which neither the defendants nor their representatives show up at any time in court, while the witnesses of contestation (*shuhūd al-ṭa'n*) were only faceless entities.

Upon the defendants' failure to furnish evidence through witnesses, the plaintiff's representative pleads for a ruling in favor of his client on the basis of the two witnesses that testified a month earlier (one of them had his testimony contested by the other party). He also made known to the judge a fatwā signed and sealed by the muftī of Beirut,[14] Muḥammad Efendi Zādah al-Ḥulwānī, which framed the problem in the usual abstract terminology of fatwās.

> A group of people [*jamā'a*] have asked Zayd to legally represent them in a litigation and lawsuit [*khuṣūma wa da'wa*] against 'Umar, while the latter had, in turn, requested from Khālid to legally represent him in the same litigation and lawsuit against those people—both representatives having proved to the judge that they were legitimate. Then Khālid, 'Umar's representative, brings forth his litigation against Zayd, the group's representative, concerning a set of properties whose limits are so-and-so, and which are owned by 'Umar as *milk* and legally transferred to him from his father's inheritance. "And now your clients have, a year ago, illegally occupied [*waḍ' yad*] those properties by usurpation [*ghaṣb*]."[15] Zayd accepts Khālid's claim that his clients are now in possession of the properties, "but this is only because they were previously illegally occupied by your father's and uncle's client. Then your uncle's client died and the properties were left to his father who, in turn, died, and the

14. The text refers to the *madīna mazbūra,* even though no city was mentioned throughout the case thus far; the muftī's location, Beirut, is only identified at the end of the document. I'm therefore presuming that the reference here was to Beirut where the actual trial took place rather than to some city in Bilād Jubayl.

15. All quotation and punctuation marks have been added for convenience whenever the text shifts from the third to second person.

properties are now possessed by your client; all this was illegally done in a fifty-year period; and the aforementioned were all individuals who had might and power [*shawka wa ghlaba*] and everyone was afraid of them to the point that my clients could not sue them in court." Upon Khālid's denial of Zayd's claims, the latter was requested by the judge to furnish evidence for his case. He thus brought two witnesses, but only one had his testimony accepted. At this point, 'Umar's representative, Khālid, pleaded "that those people [*jamā'a*] had all admitted [*aqarra*] and confessed that the properties are the *milk* of my client 'Umar and that they neither have a right nor a lawsuit in them." Upon that plea, Zayd denies that his clients ever made such an admission, and the qāḍī then requests from Khālid, 'Umar's representative, to furnish evidence. He brought two witnesses to certify that the *jamā'a* had admitted Khālid's claims, and their testimonies were approved; but Zayd dismisses the testimony of one of the two witnesses on the basis that he was bribed [*shahida bi-l-ujra*], and the judge pushes the contester to prove the basis for his contestation. Both the represented and their representative left for a one-month period and never showed up in court again. Khālid then pleads with the judge to rule in favor of his client concerning the properties, and this based on the witnesses' testimonies who testified concerning the above admittance [*iqrār*]. Should the qāḍī therefore reply to Khālid, 'Umar's representative, regarding his request, in the absence of his opponents, and appoint a curator [*yanṣibu qayyim-an*] on the *jamā'a* so that he becomes responsible for the ruling [*li-yaṣubba al-ḥukm al-shar'ī fī wajhihi*][16] and transmits it to them [*fa-yata'adda ilayhim*]? And if the qāḍī accepts [*zakka*] the testimony of the above two witnesses secretly and in public [*sirr-an wa 'alāniyyat-an*], is such an acceptance legal?

The answer to this situation [*ḥāl*], as formulated in the question, is positive: the qāḍī should indeed forward his reply to the above opponent regarding his request. According to Abū Yūsuf[17] [...] a curator should be appointed on [behalf of] the *jamā'a* so that he is held responsible for the ruling and transmits it to them; and his opinion [*qawl*] on that issue should be adopted [as the official position among Ḥanafīs] considering what our *'ulamā'* had already stated, that the fatwā, regarding legal matters,[18] should be based on Abū Yūsuf's opinion, and also because a similar opinion was reported by Abū Ḥanīfa. It was also stated in *Jāmi' al-fuṣūlayn*[19] that the *madhhab* of the imām Muḥammad [Abū al-Ḥasan al-Shaybānī] was close to Abū Yūsuf on that matter: there is thus a consensus.

It was noted in *Sharḥ al-wahbāniyya,* based on a chapter from *Adab al-qāḍī,* based in turn on the *Fawāyid,* that when a man acknowledges to a judge that

16. Literally: "so that the ruling comes right to his face."

17. For complete references to the works cited in the fatwā, see table below.

18. Unclear (redundant?) statement: "regarding legal matters."

19. For complete references to these works, see fatwā table below (Table 7-2).

> he owes something to another, and then he disappears before the final ruling, which his based on his acknowledgment, comes through, the judge thus enjoys the full right to proceed, through consensus [*ijmā'-an*], with his ruling in the absence of the missing person. And if there is evidence regarding an obligation [*qāmat 'alayhi bayyina bi-l-ḥaqq*] [towards another person], which he denied, and he then disappears and dies before the judge was able to proceed with a ruling, then even though evidence had been validated [*zukkiyat al-bayyina*], it is illegal to rule with such evidence. However, Abū Yūsuf claimed that such a ruling is possible [under those conditions]; and al-Khāṣī, in *Ikhtibār al-Khaṣṣāf,* reiterated Abū Yūsuf's opinion, and so did al-Ḥulwānī. And in the same text [which one?], few lines later, it was reported from the imām Muḥammad [Shaybānī] in the *nawādir* ["rarities"] a similar opinion to that of Abū Yūsuf: the qāḍī and imām Abū 'Alī al-Nasafī said that "I have seen in some of the *nawādir* ["rarities"] of Abū Ḥanīfa, God blesses him, a similar opinion to that of Abū Yūsuf." So it has become a common procedure for the qāḍī to appoint an agent [representative] for an absent litigant, and then proceed with his ruling in the presence of that agent. It is also noted in the *Durr al-mukhtār,* regarding the issue of a qāḍī appointing an agent for an absented disputant, that when the opponent absents himself, the qāḍī should appoint an agent for all absentees—and that is the second opinion.[20] I said that in *Sharḥ al-wahbāniyya,* based on *Sharḥ adab al-qāḍī,* that this was the opinion of the majority, namely that the judge should approve on an evidence for a period he sees appropriate and then appoint an agent. And the same applies when the judge approves [*zakka*] those witnesses in the absence of those who are implicated in the witnessing [*al-mashhūd 'alayhī*], such an approval is legal because its purpose is to show the legality of the witnesses for the qāḍī and not for those who are implicated in the witnessing. And it was noted in the *Durr,* based on the *Majmū',* that it should be enough for the judge to give his approval on the witnessing without the presence of those who are implicated. Thus, our *'ulamā'* have already pointed out on more than one occasion on the conditions of approval [*shurūṭ al-tazkiya*], but never insisted that those who are implicated should be present. That is evident while following their reasoning in *Kitāb al-shahādāt,* that if the witnesses have changed, then the judge should inform the defendants and that he intends to proceed with the ruling. The conclusion from all of the above is that the judge should appoint an agent on behalf of the evaders and give a ruling in his presence so that the legal right, established through evidence, does not get lost.

As soon as the judge read the muftī's fatwā, he called for the defendants' representative, Qāsim al-Siblīnī, after having approved the two witnesses' statements who had witnessed against the defendants and in favor of the Emir.

20. The first was Abū Yūsuf's.

When Siblīnī claimed that he was dismissed (*'uzila*) by his clients, a claim that was rejected by the plaintiff's representative, the judge appointed him agent in lieu of his absented clients and then ruled the legality of the Emir's milk over the two farms.

For analytical purposes, this case could be divided into eight different steps (see Table 7-1 *infra*), and only in the last one did the fatwā intervene as the most decisive element that pushed the judge to rule for the plaintiff. What had kept the judge hesitating was the *absence* of the defendants for over a month: Could he have ruled *in absentia?* Could he have decided on his own? What is unusual in this case is that the fatwā was summoned by the plaintiff rather than the judge himself as in a few other cases to come (see Chapter 8 *infra*). Usually, the existence of a fatwā points to a hard case, or a difficulty that the judge encountered in his ruling. The inability to rule stems from a difficulty in finding an authoritative text that would act as precedent and that would thus allow the judge to rule by analogy (more specifically through *takhrīj*). In effect, even though Ḥanafī judges were permitted at their discretion to exercise their own independent reasoning and rule by *ijtihād* whenever the reliance on a text turns problematic, sharī'a court judges, however, rarely did so as they would typically prefer to be rescued by a fatwā (C 8-2, 11-7 & 11-8 *infra*). The fatwā therefore provides the judge with the crux of the argument to seal his case. In this case, it was blocked on the matter of issuing a ruling in the absence of the defendants, and the muftī was indeed in favor of a ruling but only after an agent on behalf the absentees is appointed by the judge. But while court rulings were typically secretive about the logic of their arguments, or, as in fictitious litigations, the logic remains hidden in many concealed subtleties, analogical reasoning usually dominates the logic of fatwās. Fatwās were thus always a welcomed contribution as they invariably gave more argumentative weight to an otherwise heavily routinized process of adjudication. One would have expected that for something as obvious and common as defendants not showing in court for the ruling, that the judge would have had a ready-made solution. But as both text and fatwā indicate, an expertise was needed to draft a final opinion based on a conglomeration of previously established ones and pulled out of the juristic typology of the school. The sorting out of such opinions, and their labeling into different priorities and categories, is what constitutes the essence of any fatwā—the kind of expertise that judges and their scribes might have lacked at the time.

Table 7-1
Synopsis of Milḥim Shihāb Case (Beirut, May 12, 1843) (C 7-2)

Step #	Plaintiff: Emir Milḥim Shihāb	Defendants (5), from Bilād Jubayl	Judge	Observations
1		Appoint Qāsim Siblīnī as their representative; witnesses in pairs of two confirm the act of representation.	The overall *tawkīl* (contract of representation) approved by the judge.	Plaintiff's representative status confirmed without any need to witnesses.
2	Representative presents his case concerning the two farms: his client had them as inheritance from his father and as *milk* for fifty years, and it was only within the last year that the defendants took hold of them.	Representative claims that his clients owned the two farms fully when, fifty years ago, the plaintiff's father and uncle illegally occupied them.		
3	Representative rejects defendants' claims.		Judge requests evidence from defendants.	Defendants having acknowledged that they were now in possession of the farms, are requested to furnish evidence for their *waḍ' yad*.
4		Defense brings two witnesses to court; one of them has his testimony rejected.	Judge rejected testimony of one of the defense's witnesses?	Text leaves uncertain the issue of who had rejected, and why was the testimony refused.
5	Representative requests that court accepts his client's claims.	Representative rejects his opponent's proposal.	Judge asks for evidence from the plaintiff.	Plaintiff was asked for evidence for the first time.
6	Two witnesses on the plaintiff's side.	Defense contests one of the plaintiff's witnesses on the basis that he was bribed.	Judge requests from the defense evidence proving that witness was bribed.	
7		Defendants and representative were absent from the court for a month and never came back.		
8	Representative makes a (second) plea to the judge to rule in favor of his client and presents him with a fatwā from the muftī of Beirut who argued that if an opponent was absent prior to the final ruling, an agent should be appointed on his behalf by the judge, who would also transmit the final ruling to him.		Following the spirit of the muftī's fatwā, judge reappoints Siblīnī as agent for his absented clients and rules in favor of the plaintiff.	

The proposed synopsis assumes seven steps prior to the fatwā. Compared to all other Shihābī cases, this would be the third "genuine" litigation (together with C 3-1 & 7-1 *supra*): several elements, such as the accusations against the Shihābs, the date of the trial, and the rejection of two witnesses' testimonies, the absentee defendants, the fatwā, all contribute in the authentication of the case. The date itself—1843—is revealing since the Shihābs had lost power in light of the Egyptian withdrawal in 1840 when Bashīr II's fate was sealed in exile; his cousin, Bashīr III, who succeeded, him proved weak and lost power in humiliating circumstances a year later in 1841. It is possible, therefore, as both parties claimed (but for different reasons), that the status of the two farms became uncertain by 1841/2 when the Shihābs had lost power completely. The plaintiff claimed that he and his father owned these properties for fifty years and were illegally occupied by the defendants in 1841/2. The defendants for their part claimed that they did nothing but recuperate properties that they originally owned but which the Shihābs had kept for themselves when they were at the apex of their political power—a form of accusation that was not that common in the language of the courts.

As all other cases in this study show, contesting witnesses' testimonies was not a common phenomenon either. The first two witnesses were introduced in step 4 as soon as the plaintiff's representative rejected the defendants' claims. The defendants, having acknowledged that they were the ones *now* in possession of the two farms, were pressed for evidence (step 3). Hence two witnesses testified and one had his testimony rejected—but by whom and for which reasons? Since in step 6, when the defense contested one the plaintiff's witnesses on the basis that he was bribed, the text becomes specific as to the whom and why, it is therefore safe to assume that for the first contested witness, the contestation came most probably from the judge himself for an unspecified reason; and had the plaintiff's side challenged the testimony, it would have been duly noted in the text. One should add that all rejections were treated exactly the same way as the validations, that is, unless the testimony came to be suspected by the *other party,* and since witnesses were not cross-examined and simply reproduced their party's statements, it was simply left unchallenged. Thus, testimonies go through a double process of validation, beginning with the judge and then through both parties, and it was only when it was formally approved by the judge that opponents could contest it. Hence while the second part is usually manifestly present—especially in the case of a contestation—a judge's approval or disapproval remain curiously with very little textual excuses.

Similarly, the fatwā was constructed along similar lines of thought. The muftī had to rely on fourteen different Ḥanafī opinions (or fragments of opinions) prior to reaching his own conclusion (see Table 7-2 *infra*). Besides

quoting some of the most impressive names and works, it was typical of muftis not to venture into little well known works and poorly recognized jurists since the whole process of writing fatwās (and there might be a parallel with drafting rulings) consisted less in convincing than in constructing an authoritative opinion. Beginning first with Abū Ḥanīfa and his two companions, the *ṣāḥibayn,* Abū Yūsuf and Shaybānī, the fatwā then moves on to some of the main Ḥanafī jurists of the classical period, such as Ḥulwānī, Nasafī, Ḥaṣfakī, and Khaṣṣāf; finally, the Ottoman period has its own class of jurists of the likes of Ibn Nujaym, Ramlī, ʻImādī and Ibn ʻĀbidīn, and this last category even though it "updates" the fiqh to contemporary problems, opinions, and fatwās, the latter were nevertheless seldom drafted in such a way as to indicate any *coupure épistémologique* with the classical period—the law never presents itself as a discursive practice evolving in time and space with issues problematized differently from one period to the other.

Table 7-2
Opinions in the fatwā of Beirut's muftī (C 7-2).[21]

#	Author	Text	Opinion[22]	Observations
1	Abū Yūsuf	n.t. [probably *Kitāb al-āthār,* Cairo, 1355/1936].	A curator should be appointed by the judge on behalf of the absent people (*jamā'a*) so that he is held responsible for the ruling and transmits it to them. A similar opinion was apparently attributed to Abū Ḥanīfa.	Opinion is quoted from a non-identified Abū Yūsuf text in an ad hoc manner, and even though that's the main opinion in the fatwā, on which is structured the rest, it curiously lacks a plausible explanation as to the logic of an *ex parte* ruling in the absence of one of the parties. Moreover, the opinion avoids the crucial issue of the evidence put forward by the absented party and that might have been validated by the judge (see # 3-5 below).
2	[Ibn Qāḍī Samāwinah, Maḥmūd b. Isrā'īl]	*Jāmi' al-fuṣūlayn.*[23]	Reports that Shaybānī's opinion is in conformity with Abū Yūsuf in (1).	The consensus of the school's three founders is now complete.
3	[Khaṣṣāf al-Shaybānī in *Adab al-qāḍī?*]	*Sharḥ al-wahbāniyya,*[24] based on *Adab al-qāḍī,*[25] based on the *Fawāyid* [*Fawā'id*].[26]	When a man acknowledges to a judge that he owes something to another, and then disappears before the final ruling on what he has acknowledged comes through, then the judge has the right to proceed, through consensus (*ijmā'-an*),[27] with his ruling in the absence of the missing person.	Confirms Abū Yūsuf's opinion, without, however, requiring appointment of a curator.

Table 7-2: 1/4

21. Kept in their original order. Brackets show my own additions. At times, it was difficult to determine whether the same book was used for a different opinion, due to an uncertainty while guessing and filling in the gaps, hence the interrogation marks (n.t. = no text specified).

22. Opinions are kept as close as possible to the wordings of the original fatwā (see above for the complete text).

23. Ibn Qāḍī Samāwinah, Maḥmūd b. Isrā'īl, *Jāmi' al-fuṣūlayn,* 2 vol. (Cairo: al-Maṭba'a al-Azhariyya, 1300/1882).

24 Could not identify author and full reference.

25. There are several *Adab al-qāḍī* manuals in all the *madhāhib*. One of the most authoritative in the Ḥanafī literature is that of Khaṣṣāf al-Shaybānī (Abū Bakr Aḥmad) who died in 261/874.

26. There are several *Fawā'id* books in Ḥanafī literature; the likelihood, however, that the reference here is to Ibn Nujaym, *al-Fawā'id al-zayniyya fi madhhab al-Ḥanafiyya* (al-Dammām, Saudi Arabia: Dār Ibn al-Jawzī, 1994).

27. Implying a "consensus" among various conflicting authoritative Ḥanafī opinions, which is what the present fatwā is attempting to achieve.

#	Author	Text	Opinion[22]	Observations
4	id.?	id.?	If there is evidence concerning an obligation that someone owes to another, which he denied, and then disappears and dies before the judge is able to rule, then even though the evidence has been validated, it is illegal to rule based on that evidence.	The only "negative" opinion not in favor of the judge proceeding with a final ruling. The obligation towards the other person, even though denied by the absentee, must nevertheless be validated by the judge himself, based on the other party's evidence and the inability of the absentee to provide any counter-evidence.
5	Abū Yūsuf	n.t.	A ruling is possible on (4).	Judge can rule because as stated in (12) below, the validation is for the judge himself prior to being so for the concerned parties. In our case here, crucial evidence was introduced by the plaintiff, and partly rejected by the absentees. The judge must therefore 1) validate plaintiff's evidence; 2) appoint a curator; and 3) draft his final ruling.
6	al-Khāṣī[28]	*Ikhtibār al-Khaṣṣāf*.[29]	Reiterated Abū Yūsuf's opinion in (5).	
7	al-Ḥulwānī[30]	[?]	Same as (6).	
8	al-Khāṣī(?)	*Ikhtibār al-Khaṣṣāf*(?).	Reports that Shaybānī had a similar opinion to Abū Yūsuf (5?)	

Table 7-2: 2/4

28. Could not properly identify author's name and reference. One possibility is ṣadr al-Dīn al-Khāṣṣī al-Khawārizmī (from Khāṣṣ, a village in Khawārizm), a faqīh who lived in Egypt between 579-634/1183-1236.

29. Could not identify full reference.

30. 'Abdul 'Azīz b. Aḥmad al-Ḥulwānī, *Sharḥ al-siyar al-kabīr ta'līf al-imām b. al-Ḥasan al-Shaybānī,* manuscript completed in 480/1087 (Beirut: American University of Beirut Jafet Library, MS 349.297/H195A).

#	Author	Text	Opinion[22]	Observations
9	Abū ʿAlī [Aḥmad b. Sayf al-Dīn (?)] al-Nasafī[31]	[*Sharḥ al-fiqh al-akbar*(?)]	"I have seen in some of Abū Ḥanīfa's *nawādir* [...] something similar to Abū Yūsuf [5?]."	The *nawādir,* "rarities," were Abū Ḥanīfa's less authorized opinions.
10	[Ḥaṣfakī][32]	*Durr al-mukhtār.*[33]	When the opponent absents himself, the qāḍī should appoint an agent for all absentees.	This is the second opinion after Abū Yūsuf's.
11	[Imām ʿUmar b. al-ʿAzīz for *Sharḥ adab al-qāḍī.*]	*Sharḥ al-wahbāniyya,* based on *Sharḥ adab al-qāḍī* [of Khaṣṣāf].[34]	Judge should approve on the evidence for a period he sees appropriate and then appoints the agent for the absent disputant(s).	
12	id.?	id.?	When the judge approves (*zakka*) those witnesses in the absence of those who are implicated in the witnessing (*al-mashhūd ʿalayhī*), such an approval is legal because its purpose is to show the legality of the witnesses for the qāḍī and not for those who are implicated in the witnessing.	The crux of the argument regarding abstention and ruling under such conditions is finally developed in this non-identified opinion. It all amounts to less with drafting a ruling in the absence of one of the parties, but more in validating a party's testimonies while the opposing party is absent. It all points to the crucial fact that the validation of testimonies is relative to the input of both parties and their presence in the courtroom.

Table 7-2: 3/4

31. The well-known Nasafī who interpreted the legal thought of Abū Ḥanīfa was Aḥmad b. Sayf al-Dīn al-Nasafī, *Sharḥ al-fiqh al-akbar alladhi allafahu Abū Ḥanīfa Nuʿmān b. Thābit al-Kūfi,* manuscript completed in 845/1441 (American University of Beirut Jafet Library, MS 349.297/N241). Could not identify any Abū ʿAlī Nasafī among Ḥanafīs. The other possibility is ʿAbdullah b. Aḥmad al-Nasafī (d. 710/1310), *Kanz al-daqāʾiq* (Multān: Maktabah-ī Imādīyah, 1979), upon which is based Ibn Nujaym's *Baḥr.*

32. Ḥanafī faqīh and muftī of Damascus (d. 1677).

33. Muḥammad ʿAlāʾ al-Dīn al-Ḥaṣfakī, *al-Durr al-mukhtār sharḥ tanwīr al-abṣār* (Cairo: Maṭbaʿat al-Bābī al-Ḥalabī, n.d.), upon which is based Ibn ʿA±bidīn's *Radd,* the last major Ḥanafī treatise.

34. Imām ʿUmar b. ʿAbdul ʿAzīz, known also as al-Ḥusām al-Shahīd since he was killed in 536/1141, *Sharḥ adab al-qāḍī* [of Khaṣṣāf] (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994).

#	Author	Text	Opinion[22]	Observations
13	[Ḥaṣfakī]	*Durr al-mukhtār,* based on the *Majmū'*.[35]	It should be enough for the judge to give his approval on the witnessing without the presence of those who are implicated.	
14	[?]	*Kitāb al-shahādāt.*[36]	If there is a change in the witnesses, then the judge should inform the defendants that despite the change he intends to proceed with the ruling.	
15	Muftī of Beirut (1843)		Judge should appoint an agent on behalf of the evaders and give a ruling in his presence so that the legal right, established through evidence, does not get lost.	Conclusion and final point of the fatwā.

Table 7-2: 4/4

35. Could not identify author and full reference.

36. Could not identify author and full reference.

The fatwā makes it plainly clear that the judge should be concerned with two interrelated issues prior to drafting a ruling. First, regarding the bi-testimonial evidence furnished by the plaintiff, one of which having received a challenge from the defendants, should the judge validate that evidence by himself, in the absence of the defendants, and then proceed with the ruling? Second, would a ruling drafted in the absence of one of the parties still be legal? The first issue points to the difficulty in validating evidence when the opposing party that challenged some or all of that evidence has absented itself. In other words, testimonial evidence was not validated through objective reasoning (presentation of factual evidence and systematic investigation), but by the challenge presented in court by the opposing party. Unless, therefore, both parties are *physically* present in court, the validation of testimonial and other evidence would pose a problem. In effect, anything could count towards the final act of validation, so that even the silence of the other party is as important as denial or acceptance. If, therefore, the strategies deployed by both parties in court are what leads to the ritual of validation, can a judge accept a testimony with the (intended?) absence of the other? (Notice that the fatwā does not distinguish between intentional or non-intentional, and accidental or non-accidental, abstentions.) In our case here, the plaintiff had introduced testimonial evidence, which was partly rejected by the defendants, who then absented themselves. Clearly, the hope of the absentees was to invalidate the plaintiff's evidence: it might indeed seem strange that evidence *could* be even invalidated by simply having one of the parties absenting itself. But that's only because we're used to modern systems of reasoning in which evidence is supposedly constructed independently of a subjective observer, an epistemology and cognitive practice borrowed from the natural sciences. So, the point here is not simply the absenteeism of the defendants, but the fact that, prior to their absence, they did contribute in the process of evidence making, but having not participated in the process right to the end, validation was left incomplete: Should therefore the judge complete the validation process with one party only, and then draft a ruling? The fatwā was affirmative.

The first opinion in the fatwā comes from Abū Yūsuf, and even though no text was specified, it looks as though it was based on *Kitāb al-āthār.* Basically, Abū Yūsuf's opinion structures the rest of the fatwā by stating that a curator (or agent, or representative) should be appointed by the judge on behalf of the absented people (the *jamā'a,* or group of five defendants), and then proceed with his final ruling, and it is the responsibility of the appointed curator to transmit the judge's final decision to his "clients." In principle such an opinion from a prestigious faqīh should have been enough for the judge to proceed with his ruling (in his conclusion (15), the muftī does nothing more, after fourteen "similar" opinions, to go back to the "source," that is Abū Yūsuf).

What is the purpose then in adding thirteen more opinions when the first one seems perfectly clear and suitable for the case in question? The muftī had probably two problems in mind. First, the problem of *ijmā',* and, second, that of a non-completed process of testimony validation: Is it possible for the judge to proceed with validation in the absence of defendants whose contribution in the process was vital?

What this fatwā exploits well is the practice of consensus. If consensus implies a group of authoritative authors and texts that serve as vehicle for judicial decision making, then each generation (*ṭabaqa*) of Ḥanafī scholars creates its own set of references. To be sure, consensus cannot be reduced to an identification of a set of authors and texts, but rather, and more appropriately, it consists in the practices that each generation generates for itself in order to create the appropriate tools that are needed for recognition and adjudication. As such the process consists less in finding the authoritative texts, and more in the interpretive methods needed to deduce—either ad hoc or through analogy, metaphor, and doctrine—all the opinions that are necessary for the work in progress of both the fiqh and the sharī'a courts. Thus, even though consensus is what provides the madhhab with an illusion of autonomy and continuity with the past, each generation of Ḥanafī scholars de facto "historicizes" that hermeneutical movement through the juristic typology encountered in Chapter 1. What emerges in each generational movement is a set of practices accepted by the majority, which determines the interpretive and adjudicative methods. Consensus therefore generates a set of practices that helps in finding the required texts and creating the appropriate interpretive tools, all of which are for the sole purpose in keeping the fiqh tradition alive and the adjudication of the courts working according to the rules of the madhhab. Neither the interpretive process nor the adjudication of the courts are a closed and systematic process, in that they cannot be simply identified as a set of clearly established texts and rules. Jurists typically do not construct manuals systematically from scratch with an eye as to what their ancestors have produced. In fact, despite all the deployed efforts to limit extra-legal effects, a fiqh manual, in a way similar to a muftī's fatwā, integrates some of the societal needs of its period, and as a result, looks more like an open source for requests, problems, and solutions, than a systematically structured manual.

Besides his concern with *ijmā'* (and hence indirectly with *isnād*), the muftī was also looking for a method to interpret, classify, and sort out the various opinions. In the table of opinions (Table 7-2 *supra*), (2) adds nothing to (1) but simply reinforces the consensus by adding Abū Yūsuf's alter-ego, Shaybānī; the (1) and (2) combo already brings a consensus of all three founders around the crucial issue of abstention; (3) is more specific than (1) in that it brings the issue of a validated testimony (it hasn't been denied, at least not yet) prior to

the absence of the party that provided that evidence, so that the appointment of the curator is not perceived anymore as solely the outcome of an absented party, but that of validated evidence in need of a ruling. But (4), which was the only "negative" opinion in the whole set, finds it illegal to rule with an approved evidence, but which the absented person in the litigation, who died, had denied in the hearings: it thus adds to (3) the possibility of an evidence that the absentee had denied to the judge, which brings us a bit closer to our case. However, in (5) we realize that Abū Yūsuf was in favor of a judge's ruling under those same conditions as (4); and all what opinions (6) to (9) do—and they all come from different Ḥanafī sources—is create a direct consensus around Abū Yūsuf's opinion that the judge should proceed anyway regardless of the condition of the absentee and his denial of evidence. However, in the two positive opinions originating from Abū Yūsuf (1 and 4), there is no manifest logic that has been identified as to why a judge should proceed either way. Thus, between (4) and (5), the fatwā moves from one opinion to its direct negation without providing for even a minimalist argument. In fact, the only reason thus far to follow (5) rather than (4) is that the former is Abū Yūsuf's.

Hence, it is only in (10) with Ḥaṣkafī and his *Durr al-mukhtār* that we finally come to something new—at least "new" to the muftī himself since he claimed that "this is the second opinion." If we consider Abū Yūsuf's opinion in (1) to be the first, around which all others were structured, the difference between the two seems indeed minimal. Perhaps the only novelty is in the statement "when the opponent absents himself," which implicitly implies an act of absenting oneself done willingly for strategic reasons (e.g., with the hope to nullify evidence); otherwise the appointment of a curator for all absentees was already in (1). Actually, a genuinely new element comes only in the last set, (11) to (14). Those last opinions were all concerned with the judge approving (*zakka*) upon acts of witnessing in the absence of all concerned, that is, "those who are implicated in the witnessing (*al-mashhūd 'alayhim*)." Such testimonies might have been rejected by the other party, which later absented itself without providing evidence upon which the rejection was based, as happened in our case here, or they might have been accepted by both parties, including the judge. In both cases, however, the judge needs to deliver a judgment, based on those testimonies and their acceptance or rejection, but in the absence of those who are concerned. What the last four opinions do is separate the *interest* in knowing the "truthfulness" of a testimony from those implicated and keep it within the judge's jurisdiction on the basis that such testimonies are destined to him in the first place since the act of validation is primarily related to the judge—he needs to be convinced that all utterances are true and accurate, and base his judgment on the truthfulness of the actors—

rather than the disputants themselves or those who delivered the testimonies (12). That's fair enough, but why then do some of the other opinions show a concern with partially validated testimonies? Isn't it because the absence of the opposing party prevents a full validation? Indeed, the judge is the one to give his final approval on procedures, testimonies, and their validation, but since the process of approval upon a testimony is less *content* oriented, and more a wait-and-see attitude from the other side, the absence of any one party poses a serious challenge to the judge.

In hindsight though only three of the fifteen opinions turn crucial: (1), (5), and (12), all of which are stated on an ad hoc basis, while the rest help in adding consensus. Thus, the proposal to appoint a curator in (1) is neither situated in the context of Abū Yūsuf's legal reasoning nor in that of the particular text, which remains unidentified, from which the opinion was extracted. Deprived of its original source, the opinion only makes sense in the context of both fatwā and case at hand. Stated in an ad hoc manner, it is supposed to work by analogy to the present case: the appointment of a curator solves the problem for the judge in that he will notify his "clients." Hence the implicit idea in (1) is indeed based on the more general notion of representation, and hence overlaps with that of representatives appointed by the disputants. In our case here, however, it is the judge *imposing* representation on the absented party, and making the curator responsible for the transmission of the ruling to his "clients." But the notion of a judge being able to *impose* representation is never explicitly stated as such and remains one of the fatwā's main hidden assumptions, and its first one.

The third opinion is as crucial as (1), but still needs (4) and (5) to be fully effective. In fact, (3) introduces the notion of a testimony prior to the testifier becoming an absentee, while in (4) the testifier self-denies prior to absenting himself. As in (1), all those opinions are stated ad hoc and supposed to work analogically in conjunction with the case. Thus, even though the defendants did not self-deny what they had uttered in court, they did, however, refuse to endorse one of their opponent's testimonies: hence self-denial in (4) works by analogy to rejecting an opponent's testimony since evidence has become uncertain in both. Again, what is assumed is not explicitly stated: Can the process of testimonial validation still work when the testifier either self-denies or absents himself? The unconsciously hidden notion is that testimonies are only effective in the presence of the other, and thus have no value on their own, to the point that in a lawsuit, if a party only testifies to the judge, the testimony is weakened due to the absence of the other. In short, it is the *relative* nature of testimonies that is the second major assumption in the fatwā: they are unable to carry a truth-value on their own independently of the assessment of all disputants.

Opinion (12) is the third most crucial one. It gives the judge the power in validating all testimonies even in the absence of those "implicated in the witnessing." The novelty here is the explanation: a judge's approval "is legal because its purpose is to show the legality of the witnesses for the judge himself and not for those who are implicated in the witnessing." Besides freeing the judge from linking his approval to the presence of all those implicated, it links validation to his discretionary powers. With the explication that it provided, opinion (12) looks as though it flows deductively from both (1) and (3), but a closer look reveals that the freedom granted to the judge to validate testimonies and to rule in the absence of those implicated follows post hoc from (3). Another possibility is to look at (12) in the same way as (1) and (3): all three are ad hoc statements that are implemented within the case by means of analogic reasoning.

Fatwās are therefore devices that work in conjunction with cases at hand (it doesn't matter much whether the case is real, hypothetical, or imaginary). Their practice consists in picking opinions from various authoritative sources by decontextualizing them from the latter: it is indeed irrelevant what the specified opinion meant in the context of the text it was extracted from. It then follows a process of contextualization in conjunction with the case at hand. It is possible to distinguish two kinds of opinions. First, a limited number of crucial opinions, usually stated ad hoc, which serve to structure the totality of the fatwā and provide the muftī with the main arguments, to which is added another set of opinions that are merely consensual in nature: they add nothing to content. Moreover, all opinions of the first category are analogically linked to the case in question. Fatwā making is therefore a continual process of bricolage, of montage and collage, or a juxtaposition of elements from different sources and historical periods, all of which are brought together in conjunction with the "event (*ḥāditha*)" that necessitated the fatwā: once the muftī comes up with an opinion, the event becomes known as *ḥādithat al-fatwā,* or the event that prompted for a fatwā and made it possible.

That process is very similar to both the drafting of individual chapters in the fiqh manuals, and to decision-making in the sharī'a courts, all of which are an outcome of the juristic typology encountered in Chapter 1. In that global process of recognition and adjudication, opinions are collected from various texts without much concern as to their original meaning and juxtaposed in an ad hoc manner to act in conjunction with one another as a constructed system of meaning. They are then contextualized in conjunction with a specific concern—which could be anything from a sharī'a court case, to an issue (*maṭlab*) raised among the community of scholars, a chapter on a specific topic drafted by a jurist, a *Risāla,* or a fatwā—and are related to each other and to the "event" in question by means of analogical reasoning. The combination

of ad hoc statements and analogy brackets off the difficulties encountered in both deductive reasoning and induction.[37] In fact, by attempting to avoid at all cost both the logical (hence deductive) mode of reasoning, and intuitionism or induction as such, judicial decision making gives priority to analogy and metaphor, on the one hand, and ad hoc statements on the other. Such a combination works well in particular for a system which in its essence is not based on a set of clearly defined codes, but more so on notions of authoritative authors, who act like the totemic figures in primitive societies, and whose texts have to be classified and recontextualized for each generation (*ṭabaqa*) of scholars, so as to meet the specific needs of the apparatus of justice for a particular society. Thus, in a strange way, the system remains very open to contingencies and closed at the same time. Its closeness comes from the fact that the specific grammatical, syntactic, and structural character of the fiqh language is hard to modify in its substance; that essential character (*aṣl,* as jurists would say) rather adapts to societal changes by redefining the interpretive methods that determine the meaning of texts in new contextual situations. It is therefore the logic of those interpretive methods for each generation of scholars, and the new discourses that they might generate, in both civil and criminal procedures, which are worth investigating at length.

What is remarkable was how little state intervention there was, if any at all. In fact, besides the state's appointment of judges, the latter had full control over their courtrooms, and the fact that there was little effort (if any) towards a centralization of the courts, or a significant process of judicial review, one at least that would have created a hierarchy between courts (that will be the idea behind the second wave of reforms with the institutionalization of the niẓāmī courts and their hierarchies) so that litigants would have appealed to a higher court had they not been satisfied with the ruling. They could, of course, in the present sharī'a system have appealed to a higher-ranking judge, or even to a muftī who could have issued a fatwā in contradiction with or revoking a judge's ruling, but court records do not show any significant trend in that direction probably because all was left to the *personal* discretionary powers of judges rather than to institutional forces that would have routinized the appeal process, and thus helped in a process of court centralization—at least one that would have been more state controlled. The point here is that sharī'a courts were by and large left with too many powers of their own, and considering the large number of property litigations (fictional or real) that the courts were able to handle, one is naturally tempted to ask whether there was any convergence of interests between the sharī'a courts and the ruling factions

37. On the practice of analogy in the context of the so-called *pensée sauvage,* see Pierre Bourdieu, *Le sens pratique* (Paris: Éditions de Minuit, 1980), part 2, Chapter 3: "Les démons de l'analogie."

of the notables: Did the courts serve in any way as a vehicle for the protection to the nobility's landholdings? The question gains even more in importance considering that the state and local bureaucracies in Beirut and Damascus had practically no control over the adjudicative powers of the courts. Considering that those courts not only protected aggrieved landholders and deprived heirs, but more importantly, enabled property transfers to be validated, a package that included the validation of long lists of costly properties, the transcription in writing of oral testimonies, and finally, a judge's ruling, which, in absence of higher appeals courts, was hard to revoke.

Moreover, the procedural fictions we encountered in the previous chapters were not meant to "hide" any landholding patterns either from the central or local bureaucracies. Those procedures were indeed primarily meant to address shortcomings in Ḥanafī practice itself, in particular to bypass a rigid law of contract without tackling the substance of the law as such, but only by creating a set of procedures that would keep the law intact while making property transactions seem more flexible. In short, the *ḥiyal* have a long standing presence among Ḥanafīs, and procedural fictions were no more than devices within the law itself rather than, say, subterfuges against the state or local authorities. Even if, in the process of transferring and fixing property landholdings, it turns out that some state-owned mīrī lands were becoming either waqf or milk—which, it should be noted, is no easy process to document, and thus remains an assumption—that is not necessarily a sign that either the state was not aware of the procedures, or that it was a de facto strategy adopted by the notables and which the state could not stop. In other words, as I have argued repeatedly, it would be a mistake to look in hindsight at the procedural fictions as some kind of a pre-1858 hidden Land Code whose explicit formulation only came during the second wave of reforms that touched more aggressively upon the judiciary. The assumption here is that the *a'yān*'s and *muqāṭa'jī*'s interests and their relation to the state was not a problem. Certainly not a problem for the both the central and local authorities who have assumed the notables' interests for centuries, a line of interests that did not change much even with a marginal expansion of inter-regional mercantilism in Greater Syria throughout the nineteenth century. The sharī'a courts were thus left autonomous on their own so that the infrastructures of cities and their countrysides, their economies and *a'yān* networks, and the like, all worked according to their own assumptions. The court system obviously went on with the assumption that landowners controlled the greatest source of income, and hence the courts could not but work in conformity with such interests (and that was even more obvious with the regional councils).

By contrast, the regional councils were vehicles for judicial policy making (see Chapter 9 *infra*), but even in that function they did not seem to have

altered much in the traditional balance that the urban *a'yān* had kept for a long time with the state. For one thing, it was not expected that a committee of urban notables whose role was to adjudicate in an institution that at the same time paralleled and bypassed the sharī'a courts, to create a conflict with its own interests. It was in effect only with the second reforms that the balance began to shift in other directions. In fact, the judicial reforms of the 1850s and later were not only meant as a tool of bureaucratization and centralization of the courts, and the entire judicial process for that matter, but more important, their cognitive and epistemological assumptions were fundamentally different from anything that preceded them. Moreover, as in many civil-law systems, the reforms were primarily bureaucratic in nature, meaning that they were implemented hastily from above and with little grassroots from below, so that the mostly Napoleonic codes adopted by the Ottomans[38] had a similar objective as their French counterpart: to rationalize and centralize the judiciary by bureaucratizing and routinizing all practices and procedures—a process, which as far as Syria and Lebanon are concerned, is still in progress. In short, the difference between the old sharī'a and niẓāmī systems resides in a loss of autonomy of the judiciary and its centralization under the cover of state institutions and laws, even though the sharī'a courts were left, as they are still today in both Syria and Lebanon, with personal status matters, so that an institution as crucial as the family was still under their jurisdiction.

Excursus: English common law

The autonomy of the sharī'a courts, the discretionary powers of judges, and the elusive and non-systematic nature of the legal norms have led some to look at the court practices as part of a case-law system, thus bearing many similarities with medieval or modern Anglo-Saxon common-law adjudication.[39] A brief comparison between the two systems could prove to be beneficial at this juncture as it would point to major differences between a system that was meant to keep the populations and societies of the Ottoman Empire under the servitude and protection of their respective *millet*s, and the English common law whose primary aim was exactly the opposite: to bypass the local customs and divisions in society while implementing a centralized legal system but with strong regional grassroots.

38. Subtle differences did exist between the French and Ottoman codes, in particular when it came to the 1858 penal qānūnnāme (see Young, *Corps de droit ottoman*).

39. Berque, *Essai,* 21: "le fiqh comme case-law"; Rosen, *Justice,* Chapter 3.

Let us first begin with precedent. A most well known aspect of common-law systems, in their English or American variants, is their use of precedent. Without getting into the historical details that led to precedent, suffice it to say that common-law precedent is *explicit* in the system, which means that precedents are not only openly used by judges for future cases, but also compiled for pedagogical, reference, statutory work, and the like.[40] Moreover, due of the importance of precedent and its explicit nature in the system, judges do contribute, albeit indirectly, in the law-making process, even if the system does not recognize that their role extends beyond adjudication (or "applying the law") as such. To my knowledge, precedent, if it ever comes in the practice of sharī'a courts, is always on an implicit de facto basis, as if judges have to hide their use of precedent if case they dare practicing it. Moreover, modern scholarship always assumes that some kind of precedent must have been practiced by judges, but the process has yet to be fully described and corroborated for at least a single sharī'a court. In short, between a system that explicitly applies precedent, and for which precedent constitutes the essence of the system, and the Islamic sharī'a system, which some would like to portray as based on implicit rules of precedence, the difference is hard to bridge.

Second, the hallmark of the medieval English common law was the assize juries in the shire courts, which began to appear by the twelfth century, and which were presided over by itinerant royal justices, and impaneled by royal writs. The extensive use of the jury in property disputes (civil actions) was not only a big step forward in that the jury contributed in both fact-finding and adjudication, but it also rooted the judiciary on a regional basis by letting ordinary people participate in the process. (The jury system was also revolutionary for two other factors: (1) it created an intermediary third body between the judge and the disputants, and, (2) it transformed the primitive ordeal procedures into ones that were more "neutral," that is, fact-finding finally came into the picture.) Moreover, centralization was achieved thanks to the "general eyre," a circuit court held by itinerant royal justices. This double movement, which rooted the system on a regional basis by letting common people bring forth their local customs only to be challenged by the royal judges, was what gave the system its unique character and a dynamic very different from the Roman-based systems of the Continent. Not only Islamic systems never had juries, but fact-finding was overall limited to what the disputants brought with them to the sharī'a court. But more importantly still, the sharī'a

40. A recent overview of the English common-law system, which recaptures the debates of the last century in a slow-moving and under-staffed discipline, while attempting to give them a new freshness, is to be found in John Hudson, *The Formation of the English Common Law* (London & New York: Longman, 1996).

system was not even partially centralized either by some state structure or internally on is own (e.g., procedures for reviewing rulings, higher appeal courts, or norms imposed by the imperial bureaucracy, etc.). Thus, while the courts were meant to be rooted in the neighborhoods of cities, they functioned on the basis of their own assumptions regarding the customs of the localities they were serving. Only the disputants, together with their representatives and witnesses came to court, and thus only they contributed to the judicial process, even though their utterances were never quoted verbatim but filtered through a rigid judicial language. Not only were the sharī'a courts for the most part left unchallenged by the central authorities, but the Ottomans created parallel legislative and adjudicative systems so that the limitations in Ḥanafī practice be addressed by other legal or quasi-legal bodies.

In medieval England, plaintiffs petitioned the royal chancery which in turn issued writs that looked like particular grievance formulas. Only when a writ was sent was a jury impaneled to prepare for a case, and even though writs became at times in rigid forms that were hard to bypass (hence the necessity by the sixteenth century of the Equity Courts), they contributed to the process of centralization orchestrated by the king's court and its entourage. By contrast, in a sharī'a court, the judge was (and still is) in principle left on his own to adjudicate, but in practice he either relies on routinized formulas, or else on the assessment of the case by a local muftī, not to mention all the opinions of his madhhab.

Thirdly, in English common law, at the time of "Bracton's Courtroom," professional attorneys began to show up in courts as procedures and jury work became more complex.[41] That led to an inevitable lengthening of the time of a hearing so that *time* became the most crucial factor that distinguished trials from their earlier ones: they lost their simple and mechanical setting when disputants would present their case without much examination and counter-arguments, and then wait for a ruling.

By contrast, sharī'a courts were a domain exclusively controlled by male judges, with no attorneys, but only with representatives whenever the disputants felt the need to be represented. Representatives were usually not professionally trained in legal matters, and acted more like confidantes towards their clients; in some cases, they were kin related. But the essential point is that courtroom hearings did not involve much give-and-take, and that was partly due to the fact that there were no third-parties who acted as professionals and were properly trained to do so. Thus, the non-verbatim nature of court documents, which supposedly were based on actual hearings, had not much to do with an alleged

41, Norman F. Cantor, *Imagining the Law* (New York: HarperPerennial, 1997), Chapter 7.

"secrecy" of the court system, but more with a lack of professional bodies that would have mediated between the judges and the social actors. That would have created a much needed controversial atmosphere with a greater variety of cases. The absence of jurors, attorneys (or lawyers), and other professionals, kept the courts well insulated from their environment, so that the body of *'ulamā'* that controlled them controlled the tempo for change: what to include and what to avoid, and which cases are worthy of a hearing. But even by the mid-nineteenth century, the term "lawyer" was so uncommon in Damascus that Qāsimī's *Qāmūs* introduces it as the newly-created *"abūkāt,"*[42] from the French *avocat,* which in turn was originally a medieval term and legal practice.[43]

Fourthly, there are two kinds of legal precedents: one based on previous rulings, and another based on previous opinions, and in both cases, analogical reasoning is applied. Anglo-Saxon common-law systems are known for relying on previous rulings, or the principle of *stare decisis,* meaning judicial review through precedent citing. By contrast, sharī'a court rulings are usually based on previous juristic opinions, or actual ones drafted by muftīs. It is quite possible that jurists and muftīs reformulated opinions that some court rulings were very much in need of, or that were procedural in nature, so that they could be used by analogy for other similar cases. In effect, large treatises, such as Ibn 'Ābidīn's *Radd,* were drafted with conflicting needs: some sections seem to have been in existence since the formation of the madhhab, while others were added as reflecting actual problems or even urgent needs, so that one has to assume that the practice of the courts got at times formulated through the discourse of the fiqh. But even if that proves to be the case, a system works differently when it only implicitly relies on some of its previous rulings, from one whose cases were discussed in regularly printed *Year Books* in order to serve as precedent and as models for training lawyers and barristers. In short, Islamic legal systems were (and are) controlled by a small group of professionals (thus drawing some similarities with civil-law systems), while English common law, since its early medieval origins, was a system that kept proliferating into society: between the judges and jurors, stood attorneys, lawyers, and barristers, not to mention the legislation of the Parliament, so that precedent came as the outcome of a large heterogeneous "society" participating into the system.

42. Muḥammad Sa'īd and Jamāl al-Dīn al-Qāsimī, *Qāmūs al-ṣinā'āt al-Shāmiyya* (Paris: Mouton & Co., 1960), 1:33-34: "That's one of those crafts that have become common and bring a lot of money, without much labor and pain, and with all the honors that follow." Even though Qāsimī notes that the Arabic term stands for *muḥāmī,* he nevertheless lists that "craft" under its foreign French name.

43. Lucien Karpik, *Les avocats* (Paris: Gallimard, 1995).

Fifthly, the nature of evidence, and its corollary fact-finding, is radically different in the two systems. In all cases examined in this study, evidence (what the texts refer to as *bayyina*) is introduced and commented upon by both parties, and even though the accuracy of a *bayyina* could be challenged either by the opposing party or by the judge himself, the system of proof and persuasion remains locked within the combined contributions of plaintiff and defendant. In other words, the system lacks a third-party investigation that could shed some light on the parties' allegations, and even present their evidence from a different perspective. Between 1300 and 1500, the English common-law jury was modernized since "It turned from the self-informing to the trial-informing jury."[44] With the scientific revolution, the scientific method of investigation found its way into the inquisitorial court system. The point here is that while the sharī'a system relied on the self-information of the disputants, English common-law courts kept opening to the outside, thus profoundly altering the nature of evidence from the medieval to modern periods.

To summarize: common-law systems, and in particular the medieval English as it evolved between the Norman conquest in 1066 and the Magna Carta, heavily relied, on the one hand, thanks to the jury system, on the customary practices and perceptions of the local people. The twelve jurors also contributed to fact-finding and in assessing the disputants' claims. On the other hand, those common perceptions were challenged and checked by the itinerant royal justices who dominated the hearing, and by the writs that gave form to grievance pleas. What gives the Islamic sharī'a courts the look of a case-law system is the common perception that the courts were always a work in progress, meaning that judges enjoyed lots of discretionary powers, which shifted the balance of power from a set of normative rules that were never codified to the courts themselves. Thus, codes and procedures were always in a process of formation, while, unlike in many civil-law systems, jurists never made an effort to systematize the law into a coherent set of codes. Such an approach, however, overlooks the efforts deployed in common-law systems in two directions: absorbing as much of customary practices as possible while maintaining a balance between all those regional customs and royal justice that served as an arbitrator. By contrast, while sharī'a law opened itself very cautiously to custom (see Chapter 1 *infra*), the courts were very much controlled by the *'ulamā'* among the urban notables: even though that was to be expected, the system received little fresh blood from its environment, while sultanic legislation was meant for another kind of adjudication and did not touch much on the practices of the courts.

44. Cantor, *Imagining,* 195.

Chapter 8

The language of judges and the performance of speech acts

Thus far, our main assumption has been that court records, despite all difficulties and problems, are worthy of examination *on their own,* that is, as totalities endowed with their own intrinsic meaning. On the one hand, court documents could not be approached without the prior assumption that their drafting, at least in the eyes of the qāḍīs and scribes who did the work of putting together the different pieces of the puzzle, has an internal logic of its own. This logic is purely "textual" in the sense that it is the document-as-text that holds the arguments together. In other words, the persons who drafted these documents did so on the basis that they made sense to them: they knew what they were doing, and it is this "knowledge" of drafting documents that "we," as modern observers, would like to capture. But, on the other hand, despite the fact that court documents are totalities in themselves, their "meaning" is not to be found *in* the text itself but is always "outside" the space of the document—in relation to other discursive formations. Such an approach thus claims, first, that it is not enough to pull out at random "facts" and "data" from court documents (an approach common to social historians and which could be described as "positivist"); second, that to consider a document-as-text and to study the meaning of its key words and sentences and the way "it all fits together" as a discursive/textual construction is only a first step and insufficient in itself. What should be of interest, rather than the "pure" or historical meaning of words and sentences, is *the use of language,* that is, how social actors *perform* in their use of language. Finally, the previous two guidelines for reading court documents, lead us to our third principle, that the essence of the enterprise is not to be found in some "secret" that lies *within* the document, but in a purely *interpretive* framework which, by definition, is an endless task.

In the previous chapters, our efforts have mostly concentrated on an analysis of court cases within their legal frameworks. That is indeed a justifiable

enterprise since the drafting of a court document is primarily set within well defined legal parameters, which were officially acknowledged by the practice of the school itself, and which for the most part have not received much of a challenge since their formative years, namely the four basic rules of the Qur'ān, the sunna, analogy, and consensus. However, both Qur'ān and sunna had ceased to play a leading role in the formation of opinions by the eleventh century, a role which by and large had been primarily relegated to the founders of each school and to a complex juristic typology. The logic of drafting court documents obviously follows its own rules, towards which juristic discourse might not always prove that helpful.

It might be helpful for analytic purposes to discern three interrelated levels in the construction of each court "case."

(1) The primary influence of the heritage of the fiqh, which usually translates in conjunction to the juristic typology of the school in question, and which helps as a preliminary template, especially when it comes to drafting fatwās on "hard" cases (C 7-2 *supra*). The assortment of opinions in the latter is a condensation of ad hoc rules in conjunction to analogic reasoning (through *tarjīḥ* and/or *takhrīj*). That kind of reasoning tends to be present in the most regular of all judges' rulings, albeit in a much attenuated form—without openly revealing the logic of the ruling, as fatwās routinely do.

(2) At another level, the drafting of court documents obeys its own syntactic rules—or grammars—which combines the disputants' claims and their representatives', together with those of their list of properties (if any), witnesses, counter-claims, and finally, the judge's ruling. In some instances, procedural fictions, through their step-by-step patchwork of devices (see Table 2-2 *supra*), did tremendously help in pulling a case together. Even though the latter were in principle all in accordance with level (1) above, they nevertheless *seem* to have emanated from the courts' peculiarities and needs.

(3) Finally, the importance of social norms should not be underestimated. Ḥanafism for its part perceives social norms almost exclusively in terms of their linguistic components, which implies a double process of recognition and adjudication to check which of those norms that ought to be "translated" in the language of the fiqh. The latter could thus be looked upon as a secondary set of abstract norms which for the most part have grown out of the primary social norms (see Chapter 1 *supra*).

This chapter would like to pursue further the reading of "cases" from those three interrelated levels, with a particular focus on the third, namely *the use of language,* which will be looked upon in terms of its *performative* role.

The previous cases, all of which centered on the trinity of acquisition, protection, and transfer, have already underscored the importance of legal doctrine, analogy, and procedural fictions in any judicial decision-making

process. Legal doctrine, which among Ḥanafīs sometimes meant an extensive use of the "general rules" of the school, enabled fitting factual situations (cases) into broad legal maxims (or labels), while procedural fictions pushed to their extremes the limitations of contract and property. Finally, literary devices such as metaphor, analogy, and label, contributed in placing all this material together—the factual situations together with lawfinding and decision-making—in order to produce a viable narrative. But what still needs to be investigated in this representation of the court documents are all the rhetorical devices that make those narratives persuasive, that is, to work effectively in conjunction with the much broader and more elusive societal norms. Indeed, the social actors, who typically are not professionals, need to be given something persuasive, meaning a justice that they would have been unable to handle on their own, and that pushes them towards court arbitration.

In order to show how the construction of an interpretive framework could vary considerably, the two cases analyzed in this chapter have been approached with a different emphasis. In the first one, the weight is on the logic of the text and what might have led to the judge's adjudication. This requires tracing various arguments back to their dogmatic (doctrinal) sources. In the second, because the logic of the arguments is more explicit and easier to track down, the focus is more on the "use of language" and the various ways linguistic "performance" comes to play.

The grammars of waqfs

[C 8-1] In a case that was heard in a Beirut court in 1844,[1] the plaintiff, ʿAlī, son of the deceased Ḥājj Salīm Ḥammūd, was from a *sādāt* and *ashrāf* family. He complained against his nephew, his brother's son, Ḥājj Bakrī, son of the deceased Khālid Ḥammūd, accusing him of illegally appropriating (*waḍʿ yad*) his father's waqf (the plaintiff's father and the defendant's uncle) and its revenues. What follows immediately is a list of the waqf properties:[2] thirteen in total, which include eleven lands mostly within the city of Sidon, a coffee-shop and a shop. As the lands had for the most part names associated to them, they do seem genuinely owned by the founder rather than simply "possessed," considering that "possession" without "ownership" meant little in urban areas. The distribution of properties points to a pattern common to waqfs, namely one that brings together properties of a vastly different nature, location, and

1. Beirut sharīʿa courts, unnumbered register and document, 14 Jumāda I 1260 (June 1, 1844).

2. See infra Table 8-1.

use, into one portfolio and a single contractual settlement (e.g., C 6-1 *supra*). Thus, not only were those properties in principle blocked for generations to come, but their management, considering their diversified nature, might have posed serious problems even to the most alert of administrators.

All the listed properties were donated as waqf by the father of the plaintiff (no date specified) who had orally[3] included as a pre-condition the ability to "get in and out" (*idkhāl wa-l-ikhrāj*), "to add and take out" (*ziyāda wa-l-nuqṣān*), and finally "to change and modify" (*taghyīr wa-l-tabdīl*) any one of the beneficiaries.

The act of revoking a waqf, known in the fiqh as *al-rujū' 'an al-waqf,* in anything related to its four constituting elements—the founder himself (*wāqif*), the properties dedicated to the waqf (*al-mawqūf*), the beneficiaries (*al-mawqūf 'alayhim*), or the text itself (*al-ṣīgha*)—had already exasperated the three Ḥanafī founders. Thus while Abū Ḥanīfa argued that the *rujū'* is legal when the founder is still alive, he nevertheless left hanging the issue of the legality of any changes after the death of the founder, as claimed by the beneficiaries, while his two disciples (*al-ṣāḥibayn*), Abū Yūsuf and Shaybānī, accepted the *rujū'* only if the founder was still alive.[4]

Be that as it may, our waqf had, according to the plaintiff, its original waqfiyya orally altered when no one but the founder himself had added some new beneficiaries: all of the founder's children who were originally excluded. Thus, because the alterations were made when the founder was still alive, there should be in principle no legal restrictions to such an action. However, one of the major legal problems was to see whether the court would accept an *oral* alteration and how it would proceed in doing so. More specifically, the *idkhāl wa-l-ikhrāj* is restricted to adding or deleting individuals from the list of beneficiaries, while the *ziyāda wa-l-nuqṣān* refers to the act of favoring some beneficiaries over others (the waqf, as a rule, does not necessarily follow the same rules of inheritance imposed by the sharī'a), and finally, the *taghyīr wa-l-istbdāl* is more general than the previous four and includes them all.[5]

An act of *idkhāl* and *ikhrāj* allegedly took place, according to the plaintiff, after erecting the waqf (no date is specified) but without its registration in the

3. Orally, at two interrelated levels. First, the six conditions specified above, which gave the founder the ability to change the beneficiaries, were *orally* added to the waqfiyya without having ever become part of the written document itself. Then, after having *orally* added this condition, the founder, at a later unspecified stage, had *orally* modified the status of the waqf's beneficiaries by requesting that the revenues be distributed among all his descendants without favoring anyone in particular (as he did originally).

4. Wehbeh az-Zuḥaylī, *al-Waṣāyā wa-l-waqf fi-l-fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1987), 172ff.

5. Zuḥaylī, *Waṣāyā,* 174-175. Such conditions and few others became known in modern sharī'a law as the "ten conditions" (*al-shurūṭ al-'ashr*), a term unknown to the classical fuqahā', but used, for example, in the Egyptian waqf law of 1946.

waqfiyya (*kitāb al-waqf*). The founder, Salīm Ḥammūd, was designated *ab initio* as prime beneficiary, but for only part of the waqf—seven out of eight shares[6]—his son Khālid (and for his future descendants,[7] if any). If there will be additional beneficiaries[8] (this clause was, according to the plaintiff, only added *orally* later as part of the *idkhāl wa-l-ikhrāj* clause, and never became part of the official *written* waqfiyya), that is, still more children of the founder, the males should have twice the shares of the females. The founder had also declared himself, for the rest of his life, the administrator (*nāẓir*) of his own waqf, to be succeeded, upon his death, by the "most mature and eligible (*al-arshad*)" of his children, and so on.[9] One such descendant, the defendant Bakrī Ḥammūd, was the administrator at the moment of the hearing,[10] and was accused by the plaintiff of monopolizing all the waqf's revenues. Since the founder had left behind three sons and two daughters, and after deducting the share belonging to his two wives,[11] the plaintiff, who was one of the founder's three sons, should have had five and one-fourth qīrāṭs as a percentage from the waqf's revenues.

6. It is only later that the document does clarify that the remaining one-eighth should pass to the two wives of Salīm Ḥammūd. The logic here is that the revenues of the waqf are divided among two distinct lines of beneficiaries. The first, representing the seven-eighths, goes to the founder's oldest son, Khālid Ḥammūd, the father of the plaintiff, and to his descendants (this, as we shall see, is the defendant's claim); while the second goes to the wives of the founder. The founder could have, of course, kept the waqf as a global unit without its division into two distinct lines. He could have thus followed, concerning the distribution of revenues among the beneficiaries, the rules of inheritance which in some cases are also followed for waqfs. But in how he did proceed, he opted for a distribution that favored one line of beneficiaries over the other.

7. To be more precise, according to the original waqfiyya, the seven-eighths of the revenues should be divided as half to Khālid and the other half is also to Khālid and to any of his future descendants. The intention behind such a division is probably to ensure that Khālid gets at least half of the revenues.

8. In Arabic: *wa 'ala man sayuḥdithuhu allāh ta'āla lahu mina al-dhukūr wal-ināth.* The *lahu* here, as elsewhere in the document, should—grammatically—denote Khālid, and *logically* denote the founder Salīm Ḥammūd. In many instances, the language of the court documents is grammatically incorrect and weak and leads to much confusion and uncertainty.

9. The document does not specify whether the founder, while being the administrator of his own waqf, would also receive all or part of the revenues.

10. A question naturally comes to mind here as to how the administration of the waqf was in the hands of the defendant, who was the plaintiff's nephew rather than to the plaintiff himself since, being the founder's son, he should have had the priority over anyone else from the next generation after his brother's death. The plaintiff, however, is suing on the basis that he was denied all his rights (his portion of the waqf's revenues) and because the defendant is illegally the recipient of the waqf's revenues and responsible for administration.

11. Their exact number, two, is only specified later.

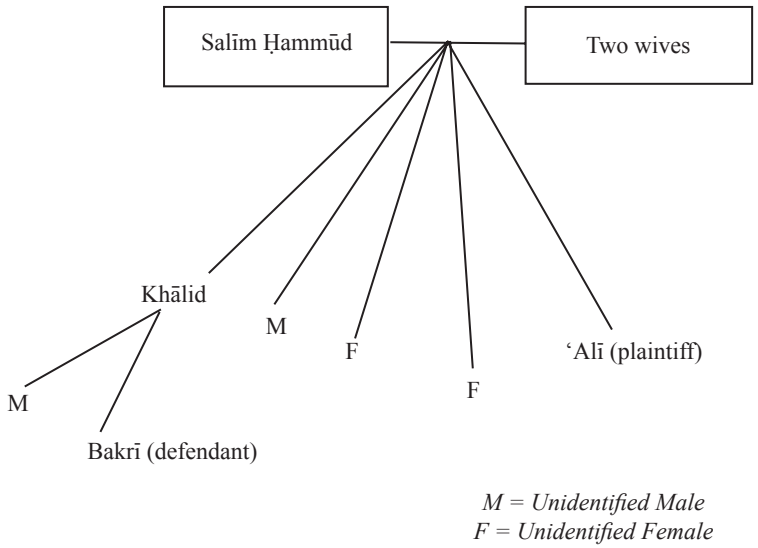

Figure 8-1. Beneficiaries of Salīm Ḥammūd's waqf (C 8-1).

Commentary: The line of beneficiaries represented by the plaintiff ʻAlī had been allegedly disfavored vis-à-vis the other line in which the benefactor's son Khālid was the dominant patriarch. The lawsuit thus attempted to redress that situation by claiming that the founder Salīm Ḥammūd had *orally* altered some of the waqf's original stipulations.

Even though the defendant acknowledged that he was in charge of all the properties as administrator, and as part of a request that was specifically made by his grandfather the founder, he nevertheless furnished a different distribution of the revenues among the beneficiaries and also denied that an oral clause in the waqfiyya permits "alterations" and "changes." The distribution, according to the defendant, gives a first share (left unspecified at this point) to the founder's two wives (presumably the same one-eighth discussed earlier); then, half of the remaining share goes to Khālid Ḥammūd, father of the defendant and brother of the plaintiff, and, finally, the other half is also to Khālid and his future descendants and beneficiaries (the women should have half of their male counterparts). Notice that in this distribution the plaintiff and his brothers and sisters receive no share at all as it was all concentrated within Khālid's own lineage.

The burden of proof is now on the plaintiff who needs to substantiate his two claims. First, concerning the fact that the waqf was allegedly open for "change" *ab initio;* and, second, that the founder, profiting from his exclusive right to impose changes, re-bequeathed his waqf for a second time with two lines of beneficiaries: in the first, the founder granted one-eighth for his wives, while the remaining seven-eighths were for his children—without favoring

anyone in particular—and grandchildren and all other descendants as well, with the women having half of the shares of their male counterparts. (According to the plaintiff, it was only after the waqfiyya had been orally altered by the founder that all his children became beneficiaries of the waqf.[12])

The plaintiff brought to court a witness from the city of Sidon described as a "primary witness" (*shāhid aṣl*), that is, someone who witnessed first-hand the act of erecting the waqf. The witness certified (*istashhada*) that, in a first stages, the founder had divided the revenues of the waqf between his wives, his son Khālid, and the latter's descendants, both male and female, in the way already specified by the defendant; but, at a later (unspecified as to the exact date) stage, having originally left the door open for further modifications, he re-bequeathed the waqf for a second time by making it into a *waqf ṣaḥīḥ,* a "legally sound waqf," whose revenues should be distributed among his wives, his son Khālid, and any other children, male or female, he might have in the future.

The plaintiff then furnished two additional witnesses, also from the city of Sidon, and who could be described as "proxy witnesses" (*shuhūd fur'ān,* from *fur',* meaning "branch" or "part") since they both came to court on behalf of another "first-hand witness," the *naqīb al-ashrāf,* the head of the corporation of notables of the city of Sidon, Saykh Aḥmad, son of the deceased Shaykh ʿAlī Jalāl al-Dīn Efendi. They both repeated verbatim the allegations of the plaintiff. The court accepts the testimony of the *fur'ān* on behalf of the original (*aṣl*), only when seven persons gave a *tazkiya* ("approval" or "certification") on both the original and the secondary witnessing (*shahādat al-aṣl wal-fur'ān*).

The qāḍī, having accepted the testimonies of all witnesses, proceeds for a final judgment and approves the claims of the plaintiff on the basis that the founder made it his right *ab initio* to alter the contents of the waqf in a way that was accepted in the "books of our tradition" (*kutub madhhabunā*).

> The qāḍī has decided that this waqf should have its revenues distributed [*tuṣraf ghillatuhu*] as one-eighth to the founder's wives and the remaining seven-eighths to all his children, with the males having twice the share of the females, as it was prescribed in the sharīʿa. According to a well-known *fatwā* of the head of the *'ulamā',* Shaykh Muḥammad [Amīn Ibn] ʿĀbidīn[13] who had digressed on what has been traditionally known in the Ḥanafī school concerning a founder who erected a waqf for himself and for his lifetime, and then, after his death, opted for a distribution of revenues as one-eighth for his wives, and the remaining seven-eighths as half to a particular son [Khālid] and

12. Which raises the interesting question as to why they were not all included in the first written waqfiyya. Could it be that the founder had only Khālid at the moment he erected his waqf? And if so, why were the changes introduced later not included in the waqfiyya?

13. The "Kitāb al-Waqf" is in *Radd,* 4:337-499.

the other half to [the same son and] his future children,[14] and the males should be given twice the share of the females as prescribed by the sharī'a. Then, upon the death of his aforementioned son, the revenues should be distributed among his children, with the males having twice the share of the females. And upon the death of his two wives,[15] the revenues should proceed to their children with the same aforementioned conditions, and then to a charitable foundation that shall never stop [*jihat barr lā tanqaṭi'*].[16]

The founder also added some further stipulations, some of which had been directly [included and] written [*masṭūr*] in the act of the waqf while others have not, such as the ability to "modify" the contents of the waqf [*al-idkhāl wal-ikhrāj, wal-ziyāda wal-nuqṣān, wal-taghyīr wal-tabdīl*] at any moment he wishes. Should we then take into consideration the clauses that were not directly written [*musaṭṭara*] in the original act of the waqf? If we say yes, should we then take into consideration the modified version of the act of the waqf which gives all children an equal share in the revenues without favoring anyone of them? And what if the [original] waqf had not been "legalized" [*ghayr maḥkūm bihi*], would it be possible to revoke [*al-rujū'*] any of its clauses or not? And suppose that the aforementioned son [Khālid?][17] had sued his father on the fact that the waqf had been legalized [*maḥkūm bihi*], and that the father had denied that [*ankara*], thus prompting the qāḍī to request from the son to furnish evidence showing that a ruling [*ḥukm*] was an outcome of a litigation [*khuṣūma*]; and suppose further that the son [Khālid?] could not prove that a litigation [*khuṣūma*] took place, should the court then consider the ruling [or "legalization"] without the litigation [*al-ḥukm duna al-khuṣūma*]? And does the son [Khālid?] have any known litigation with his father [*da'wa 'ala abīhī*] prior to the dues that should be paid to him [*qabla an yaṣīra mustaḤaqan*] from the revenues of the waqf?[18] And what if the [other] son ['Alī, the plaintiff?][19]

14. Since the text limits children to the future, Khālid must have been childless at the time.

15. It is only at this point that the number of wives is specified as two.

16. This is the defendant's version. The plaintiff's claims, accepted by the court, shall be expanded in the next section.

17. It is not clear here, as elsewhere in the text, who the "aforementioned son" might be. It makes more sense to presuppose that it is indeed Khālid rather than 'Alī, the plaintiff, since the "legalization" of the first waqf through a *ḥukm* could only have been beneficial to Khālid because it would have made any future alteration of the waqf invalid.

18. As noted earlier, it is not clear whether the founder, as the administrator of his own waqf, was also till his death the sole beneficiary. In case he was so, this would have meant that Khālid could not have had any of the waqf's revenues while his father was alive. In this case then, the question above would turn to be redundant because had Khālid had any *khuṣūma* with his father, it would have been in any case prior to the *istiḥqāq*. From a more general point of view, however, the above question might be pertinent in order to check Khālid's share from the waqf's revenues: a court's decision in any direction could have changed the amount of his share.

19. Again, here as before, there is a confusion and it only makes sense to presuppose that 'Alī is the one intended in what could be considered as a second line of questioning (the first was related to his brother

furnishes evidence [*bayyina*] that would lead to a [second] ruling [*ḥukm*], after the qāḍī's [initial] legalization [in a ruling], concerning the legality [*ṣiḥḥat*] of the reverting [*rujū'*] action taken by the founder so that all his children would have equal shares from the revenues without favoring anyone of them? Should the court then work with such evidence [*bayyina*] and not accept [*'udūl*] the qāḍī's [initial] *ḥukm* despite the fact that, at that time, the son [Khālid?] had no dues that he deserved [*lam yakun mustaḤaqan*]?

An answer [*jawāb*] to this problem is to be found in the chapter "Kitāb al-Waqf" [in Ibn Nujaym's][20] *al-Baḥr al-rā'iq,* which argued that what should be taken into consideration is what the founder said and not what was written in the original act of the waqf [*limā takallama bihi al-wāqif lā limā kutiba fī maktūb al-waqf*].[21] It is thus legitimate to validate evidence [*bayyina*] based on a condition [*sharṭ*] uttered by the founder with no equivalent in writing [in the waqfiyya]. The same applies to other "alterations" [*idkhāl wal-ikhrāj*] that were acknowledged as valid in *al-Baḥr.* If evidence is furnished by individuals who heard the utterances [*lafẓ*] of the founder—that when he founded his waqf he placed a particular condition upon himself—their testimonies should be accepted as valid. And in case he did not include in writing that particular condition in the *kitāb al-waqf,* and it turned out that [what he said orally] was valid and legally sound [*ṣaḥīḥ*], then the revocation of the original waqfiyya should be accepted. On the other hand, if that stipulation turned out to be false,[22] then revoking [*rujū'*] the original waqf is unacceptable whether it has been legalized or not. In this case, based on the opinion of the *'allāma* Qāsim,[23] the son ['Alī, the plaintiff] of the founder should consider what the original waqfiyya had prescribed for him and his children since revocation is here unacceptable [because there is no evidence that it is factually accurate]. Qāsim

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Khālid) because he was the one who should have profited the most from the oral alteration of his father's waqf.

20. Zayn al-'Ābidīn Ibn Nujaym [d. 1562], Egyptian Ḥanafī faqīh, author of *al-Baḥr al-rā'iq: Sharḥ kanz al-daqā'iq,* 8 vol. (Cairo: al-Maṭba'a al-'Ilmiyya, 1893), the "Kitāb al-waqf" is in 5:202-268. The *Baḥr* is a commentary on the authoritative work of Ḥāfiẓ al-Dīn al-Nasafī, *Kanz al-daqā'iq,* and the first Cairo edition also includes in its margins the commentary of Ibn 'Ābidīn whose personal copy of the *Baḥr* served as the first-hand manuscript for its editing and publication; Ibn Nujaym is also author of *al-Ashbāh wal-naẓā'ir* (Cairo: Dār al-Ṭibā'a al-'Āmira, 1290/1873), which includes the first most systematic treatment of the Ḥanafī "general rules (*al-qawā'id al-kulliya*)," some of which have been discussed at length earlier in this study (Chapter 1).

21. On this direct quote from *al-Baḥr,* 5:239, see the discussion below in the section "What the Founder Said."

22. That is, could not be verified as "true" or that there were no witnesses that would testify that the founder had changed some of the waqfiyya's clauses.

23. Qāsim al-Dīn b. Qutlūbughā, author of a collection of fatāwā, *al-Qāsimmiyya,* which was among no less than twenty fatwā collections on which Ibn Nujaym drew for his *Baḥr* (e.g., 5:222). For a list of these collections see, Wael B. Hallaq, "From *Fatwā*s to *Furū':* Growth and Change in Islamic Substantive Law," *Islamic Law and Society,* 1:1(1993), 11.

pointed out that because the first waqf is the valid one it should not be revoked without a stipulation from the founder [who should have explicitly stated the exact nature of the alterations].

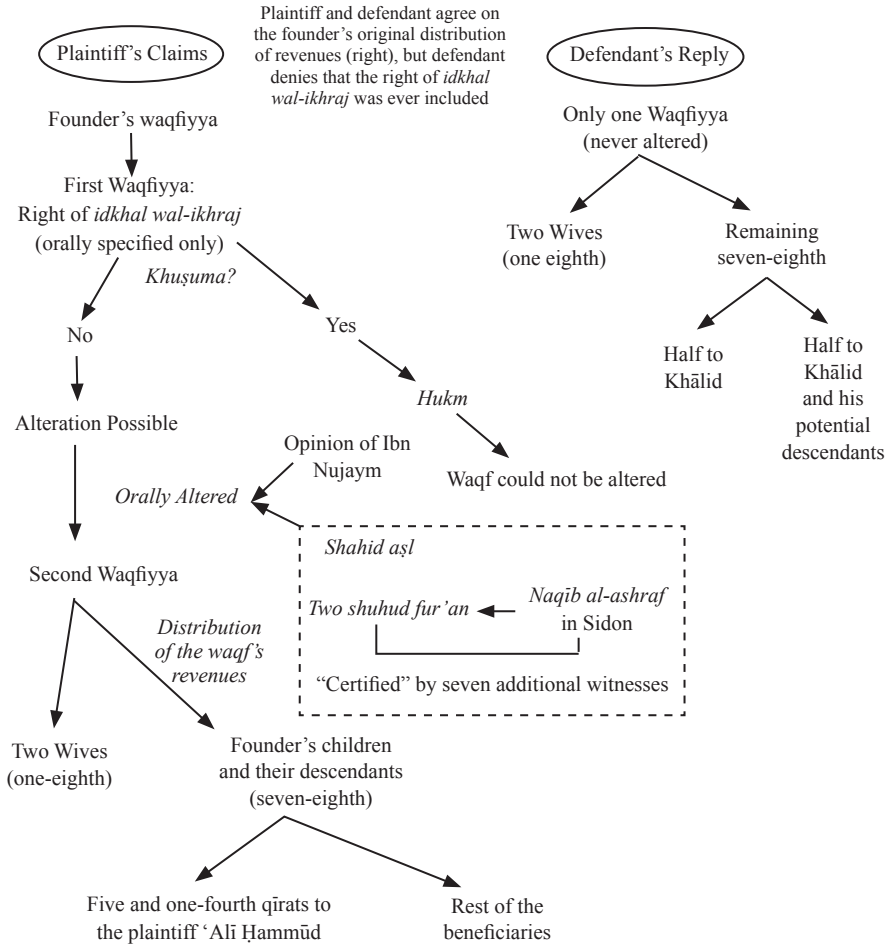
Plaintiff's Claims
Plaintiff and defendant agree on the founder's original distribution of revenues (right), but defendant denies that the right of *idkhal wal-ikhraj* was ever included
Defendant's Reply
Founder's waqfiyya
Only one Waqfiyya (never altered)
First Waqfiyya: Right of *idkhal wal-ikhraj* (orally specified only)
Two Wives (one eighth)
Remaining seven-eighth
Khuṣuma?
No
Yes
Half to Khālid
Half to Khālid and his potential descendants
Hukm
Alteration Possible
Opinion of Ibn Nujaym
Waqf could not be altered
Orally Altered
Shahid aṣl
Second Waqfiyya
Two shuhud fur'an
Naqīb al-ashraf in Sidon
Distribution of the waqf's revenues
"Certified" by seven additional witnesses
Two Wives (one-eighth)
Founder's children and their descendants (seven-eighth)
Five and one-fourth qīrats to the plaintiff 'Alī Ḥammūd
Rest of the beneficiaries
All rules specify that women should have half the shares of the male beneficiaries

Figure 8-2. Arguments in the Waqf of Salīm Ḥammūd (C 8-1).

Commentary: The arguments of the plaintiff on the left, who won his case, were all based on the key element that the founder did orally alter his original waqfiyya, and that legally speaking, such an alteration must be taken into consideration, thus amounting to a de facto second waqfiyya. From the perspective of the judge, the oral alteration, once proven through witnessing, ought to be validated and integrated within the original waqfiyya. But there still was the lingering question as to whether the original waqf was validated through a court's ruling, meaning that a validation took place through a procedural fiction (C 6-1 & 6-2). If not, then the alteration must be integrated, which was the case here.

A ratio decidendi?

Is there any rationale for reaching a decision? Is it possible to delimit the logic of judicial decision-making case by case or does it have to be more general for a more comprehensive view on adjudication? Regarding the waqf of Salīm Ḥammūd, the qāḍī gave an unusually lengthy explanation (by common standards) that accompanied his ruling. Since the defendant's outright denial of any oral alterations, most arguments are structured with the burden of proof on the plaintiff (Figure 8-2).

The plaintiff claimed that the original waqfiyya was orally altered, and the qāḍī's reply was to verify whether a ruling was granted on the original waqf. With the possible existence of a prior ruling, any alteration in any form, oral or written, would not have been possible—that is at least the implication from the judge's set of questions in his final assessment of the case.

Attempting to construe his ruling on logical grounds, the qāḍī first reiterated the defendant's position concerning a waqf whose revenues should be unequally distributed between two wives, on the one hand, and a son, and the descendants of that son, on the other; then, according to the plaintiff, the waqfiyya was subject to oral alteration in order to accommodate more equally all the beneficiaries, that is, the founder's two wives, all his children and their descendants. What is of interest, however, is the set of questions related to the oral alteration of the waqfiyya. Should the added clauses be integrated as part of the founder's intent?, is the question that conducts the main argument: How legal is an oral alteration that was not included in the original waqfiyya? A reply will only come through another line of questions on whether the original waqf was tied to a ḥukm:

> And what if the [original] waqf had not been legalized [as irrevocable] in a ruling [*ghayr maḥkūm bihi*], would it be possible to revoke [*al-rujū'*] [any of its clauses] or not?

Actually, it would have been simpler to frame the question the other way round: What if a ruling had been concluded on the original waqf as a result of a *khuṣūma* (conflict that led to a litigation)[24] between, say, the founder and

24. Ḥaydar's *Sharḥ al-Majalla,* 44, notes that the meaning of *khuṣūma* has changed since the formative Ḥanafī period from its "manifest (literal) meaning" (*ma'na ḥaqīqī*) of dispute and fighting (*nizā' wa muqātala*) to more recently, in Ottoman times, of charging someone, a *wakīl,* for the process of responding and defending against the claims of the opponent's party (*al-tawkīl bi-l-mujāwaba wa-l-murāfa'a*). This was brought up as an illustration to article 40 on the difference between the literal and customary meaning of words and propositions; the *khuṣūma* example illustrates well, to the Majalla's interpreter 'Alī Ḥaydar, one of those cases where the original legal meaning of a word was then totally abandoned—a category known as "legally abandoned," *mahjūr shar'-an.*

one of his children? Would it then be possible to revoke [*al-rujū'*] any of the oral or written clauses of the waqfiyya? The issue here is whether a *ḥukm* tied to a *khuṣūma* "seals" the waqf permanently and makes it non-revocable or whether such a waqf could still be altered. The answer is that a ruling would have permanently "sealed" the waqf, and had it not taken place, then both an oral and/or written alteration of the original waqfiyya would have been possible.

The validation of a waqf, or the act of rendering it irrevocable, has already been discussed in relation to the waqf of Bashīr III (C 6-1). In a nutshell, the validation consists of a procedural fiction where the founder, who had delivered his waqf to the trustee, brings action against him or her on the basis that the waqf is illegal, and thus demanding its return in accordance with the principles of Abū Ḥanīfa who thought that the *'ayn* of a donated property remains in the ownership of the founder, and hence could be withdrawn at any time. Only a judge's ruling would transform a property into an irrevocable waqf, meaning that the property for perpetuity is no longer in the ownership of a particular person, and is to be taken care of by a trustee or administrator (*nāẓir, mutawallī,* or *wālī*).[25] Only in Ottoman times, when legal fictions helped to extend the law beyond its limits, did the judge's ruling require going through a fictitious litigation in the form examined earlier (C 6-1 & 6-2). That implied associating the ruling with a litigation between the founder (plaintiff) and the trustee-administrator (defendant), and the defendant was asked to revoke the waqf and transfer the ownership back to the plaintiff, a proposal he or she would deny on the basis of the opinions of Abū Yūsuf and Shaybānī. Needless to say, the judge would rule in the defendant's favor and the waqf would become irrevocable.

With this in mind, it should now become clearer why the judge in the Ḥammūd waqf kept associating a possible previous ruling with a litigation: if the ruling was an outcome of a fictitious litigation, then the waqf would be irrevocable, and even though the judge was uncertain as how to proceed if there was a ruling without litigation, he was nevertheless confident enough to rule in favor of the plaintiff and accept all oral alterations as valid simply because the waqf was never previously made irrevocable through a pseudo-litigation. Had this been so, the main beneficiary (and for some time the only one), Khālid, would have sued his father for altering any of the stipulations.

The judge had to go through a set of hypothetical questions in a series of "What ifs?," mainly regarding the possibility that one of the two sons—the plaintiff or the now deceased main beneficiary—might have sued the father at some point.

25. Imber, *Ebu's-su'ud,* 147-49.

> And suppose that the aforementioned son [Khālid?] had sued his father on the assumption that the waqf had been subjected to a ruling [*maḥkūm bihi*], and that the father had denied that [*ankara*], thus prompting the qāḍī to request from the son to furnish evidence showing that a ruling [*ḥukm*] was an outcome of a litigation [*al-khuṣūma*]...

There are three main assumptions at play. First, that there already was, in order to validate the waqf and render it irrevocable, a preliminary *khuṣūma* and *ḥukm*. Second, that the father had already introduced few oral alterations and was possibly sued by his oldest son Khālid for not having the legal right to do so because the waqf had been "legalized" through a previous ruling. And, third, the final assumption is, of course, that Khālid, being, as he had claimed, the main beneficiary, would like his brothers and sisters and their descendants permanently excluded (the original waqfiyya does not include them). Were all assumptions met, then Khālid would have won his case on the basis that oral (or written) alterations are invalid after a previous ruling.

> ...and suppose further that the son [Khālid?] could not prove that a litigation [*khuṣūma*] took place, should then the court consider the ruling [or "legalization"] without the litigation [*al-ḥukm duna al-khuṣūma*]?

Is it possible to conclude a ruling without a litigation? In principle, and following standard Ḥanafī practice, the answer would be a straight yes: a judge would declare the waqf as irrevocable in a ruling simply because the founder wanted it that way, meaning that once he or she dies, the value of the *'ayn* would not revert to its original private property status, and hence be divided among the inheritors. But, following an opinion by Qāḍīkhān, it became standard practice in Ottoman times to proceed with a ruling only on the basis of a (fictitious) litigation, hence the judge's concern for a previous formal ruling, that is to say, a pre-Ottoman one, would that be enough to prevent any future alterations? That question was specifically addressed, but as it was of a hypothetical nature and came nested with other questions, it was never fully answered.

> And does the son [Khālid?] have any known litigation with his father [*da'wa 'ala abīhī*] prior to the dues that should be paid to him [*qabla an yaṣīra mustaḥaqqan*] from the revenues of the waqf?

To begin with, it is uncertain which son the judge had in mind: was it the now deceased Khālid, or the plaintiff 'Alī? The likelihood is that it was, once more, the former since any action by his father to change the modalities of the waqf would have brought his brothers and sisters and thus disfavored him. So the possibility of a lawsuit, on the basis that the waqf had already been the subject of a ruling, must have crossed his mind; and that must have come early enough so that he would have received no dues yet. A

reception of the dues would have implied an "acceptance" of the allegedly new oral stipulations.

Be that as it may, from this point on, the text now moves to the concern of the other son, even though, it must be emphasized, uncertainty hovers over all identities here:

> And what if the [other] son ['Alī, the plaintiff?] furnishes evidence [*bayyina*] that would lead to a [second] ruling [*ḥukm*], after the qāḍī's [initial] legalization [through a ruling], concerning the legality [*ṣiḥḥat*] of the reversion [*rujū'*] action initiated by the founder so that all his children would have equal shares from the revenues without favoring any one of them? Should the court then work with such evidence [*bayyina*] and not accept [*'udūl*] the qāḍī's [initial] *Ḥukm* despite the fact that, at that time, the son [Khālid?] had no dues that he deserved [*lam yakun mustaḥaqan*]?

Even though the text *seems* to have shifted from the deceased son to the actual plaintiff, the concern is still the same and the line of reasoning is identical, namely, assuming that the waqf was legalized through a preliminary ruling—as most waqfs were at the time, otherwise they would have remained revocable—how could a judge then accommodate oral alterations, if proven to be true? As the possibility of a first ruling, presumably based on some fictitious litigation, remained up in the air—meaning that it was, in the final analysis, neither proved nor disproved; or at least the text of a drafted ruling never showed up in court during the hearing—the judge will eventually accept the oral modifications as factually genuine, a key step prior to the plaintiff winning his case, thus avoiding any further discussion of his long line of questioning.

Notice that in this entire part, the text goes from one question to the other without giving any specific answers in particular. Thus all the previous questions, Was a first ruling ever issued? Was there a *da'wa* (lawsuit) between son and father? Could there be a second ruling that would revoke the first one? etc., were all left unanswered, and when an "answer" finally comes in the last section, it turns out to be a global reply to the whole case, which gives the plaintiff his due rights as beneficiary, without, however, addressing any of the specific issues raised in the questions above. In fact, the most crucial issue of whether the waqf was revocable or not was left without answer as both parties never tackled it, thus leaving it outside their domain. One would have expected from the defendant a closure on the irrevocability of his grandfather's waqf, but, instead, he rather opted for a flat denial that anything had been orally altered. For his part, and with irrevocability left uncertain, the plaintiff was now left with his most crucial piece of evidence: to prove that an oral alteration had effectively taken place, and for this, he will bring witnesses. The judge's questions, even though left for the most part without satisfactory answers, aimed at clearing out things procedurally, and since the system in its

essence was not of an investigative nature, but rather left it to the parties' own discretional powers to decide what to bring forward and what to hide, the text then proceeds as if alterations to the act of the waqf were still open.

What the founder said

The quote that will provide ample support to the qāḍī's final decision regarding "what the founder said" appears for the first and only time in Ibn Nujaym's "Kitāb al-Waqf" in a context unrelated to that of *idkhāl wal-ikhrāj*. It came right in the middle of a discussion on how the revenues of a waqf should be distributed:

> You should know [*i'lam*] that what should be considered from the stipulations [*shurūṭ*] [of a waqf] is what the founder said and not what was written in the *maktūb al-waqf* [the waqfiyya]. Thus if evidence [*bayyina*] was furnished on a stipulation uttered by the founder [*bi-sharṭ takallama bihi al-wāqif*] without any equivalent in the waqfiyya [*wa-lam yūjad fil-maktūb*], we then apply what is stated in the *al-Bazzāziyya* [a collection of fatāwā by Ibn Bazzāz al-Kurdarī[26]] [*'amila bihi limā fi al-Bazzāziyya*]. And we have noted [*asharnā*] that the waqf ought to be considered on what was said by rather than what was drafted by the founder [*al-kātib*]. The act of the waqf [*ṣakk,* that is, the waqfiyya] should thus include all what was uttered by the founder.[27]

In his final decision, the judge makes use of Ibn Nujaym's opinion (based in turn on Ibn Bazzāz) when, after a series of six unanswered questions, all duly noted for procedural purposes, he had to face the evidence furnished by the plaintiff regarding his father's oral alteration of the waqf's status. Once the facts, which showed that the founder did utter what the plaintiff had claimed, were accepted, the judge had to go through the usual process of law finding in order to fit the facts within some doctrinal rule—a process of linguistic categorization.[28]

As soon as Ibn Nujaym states his crucial opinion on the primacy of what the founder orally stated over what was written in the waqfiyya, he proceeds with concrete examples as to how the revenues should be distributed under different circumstances. Thus, there are no cogent arguments as to why it is important to favor a late oral statement over an already drafted waqfiyya,

26. Ḥanafī faqīh, known mostly for his fatāwā collection, *al-Bazzāziyya,* died in Anatolia in 1414.

27. Ibn Nujaym, *al-Baḥr,* 5:239.

28. On the importance of "categories" in the law, see, Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge, Massachusetts: Harvard University Press, 2000), Chapter 2.

except perhaps a hidden assumption that what matters most and foremost is the intent of the founder.

> There is no problem [*lā khilāf*] when [the founder] allocates the revenues [*ghilla*] [of the waqf] for his child [*waladihi*]. If the revenues should go to the children, then both males and females should be included, and if the males are the sole beneficiaries, then the female does not have the status of the son anymore. There are also no revenues for the child of the child when there is still a child [who is alive and benefits from the revenues], and if the latter is not alive, then the revenues should go to the child of the son rather than to the child of the daughter.[29]

The discussion then proceeds on with who should be considered as the legitimate beneficiary, then moves to the topic of the *istibdāl,* and finally to that of the *idkhāl wal-ikhrāj,* which makes Ibn Nujaym's opinion on the oral alterations of a waqfiyya "inserted" in the middle of a discussion to which they do not exclusively belong. In the section on the *idkhāl wal-ikhrāj* Ibn Nujaym introduces a set of similar arguments to that of the *istibdāl.*

> There have been problems [*ḥawādith*] in the fatāwā reported on the question of the *idkhāl wal-ikhrāj*. If, for example, someone adds [*adkhala*] a person [to the beneficiaries of a waqf], does this imply that the former no longer has a right [*usqiṭat ḥaqqī*] to delete [*ikhrāj*] the latter? And what if he does? Another problem is when the founder allows himself the *idkhāl* and other related items whenever he finds that necessary, and then adds, as another stipulation, that he would grant this right [of *idkhāl,* etc.] to whomever he wishes [*sharaṭa an yashtariṭa-hu liman shā'*]. So he grants it to someone else [other than himself] [*fa-sharatu-hu lighayri-hi*] and he gives him the same rights that he himself enjoyed. Then this person [to whom the rights were transmitted] grants it to someone else... Does the person [initially appointed by the founder] lose his rights [to the third person] or do they end up both with the same rights [of *idkhāl,* etc.]?[30]

The problem here, as elsewhere, in this section are rights of *idkhāl, ikhrāj,* and *istibdāl* delegated by the founder to the *mutawallī* or *nāẓir* of a waqf. What if the administrator delegates, in turn, the rights he received from the founder to someone else? What if he acts in such a way that he ends up conflicting with the interests of the beneficiaries or the waqf itself? At one point, Ibn Nujaym's answer, based on Ibn al-Humām's *Fatḥ al-qadīr* looks quite straightforward: "the question on the condition of the *idkhāl wal-ikhrāj,* and other related issues, parallels [*'ala wizān*] that of the *istibdāl* because only the founder has the right to decide [*al-infirād*] while the other [who was delegated such rights]

29. Ibn Nujaym, *al-Baḥr,* 5:239.

30. Ibn Nujaym, *al-Baḥr,* 5:243.

is unable to do so."[31] But he then proceeds to point that more complications are on the horizon, while serious discrepancies remain between the opinions of Abū Yūsuf and Shaybānī on what administrators can and cannot do.

Property rights versus contractual rights

Waqfs are generally defined as a form of private property whose *'ayn,* having been withdrawn from exchange to perpetuity, does not belong to a specific person anymore, or to an institution for that matter. Moreover, legislation on waqfs remained limited due to the fact that waqfs never achieved the status of a "legal person" and thus were represented by an administrator who, besides managing the affairs of the waqf, was also its legal representative. Thus, sharī'a court cases typically target the administrator as the guardian of the original contract, an indication that the nature of a waqf is contractual more than anything else (e.g., property rights). In a way similar to Anglo-Saxon trusts, waqf contracts are for the benefit of third parties—usually among the benefactor's own lineage—who the transferor might not even personally know. Since the founder must transfer his trust to a trustee either in his lifetime or upon his death, the contract between trustee and beneficiaries becomes effective from that moment and determines the history of the waqf.

At least since the Ottomans, and probably as early as the Mamlūks, the contractual language of both waqfiyyas and court disputes has been structured by the fundamentally incongruent opinions of the three founders of Ḥanafism. Whether such divergent opinions are merely scholastic or reflect much broader social and historical trends is a major issue that we cannot avoid addressing. For one thing, a couple of our cases (C 6-1 & 6-2) were litigated through the division of the Abū Ḥanīfa and his two disciples' divergent opinions, while our last case above (C 8-1) only assumes the master-disciple schism on waqfs, even though the judge's ruling heavily depends on it. So is such a split a mere convenience that helps to create a procedural fiction so that the law pushes forward without any substantive change? Or are such procedural fictions a way to bypass a static law of contract while creating more dynamic contractual settlements? After all, in all judicial systems, legal fictions helps in keeping the law up to date, and its importance places it side by side with legislation and doctrine. So, if as suggested thus far, the divergences between the three founders, and the incessant recurrence of their conflicting opinions in the sharī'a courts documents, were only procedural devices to legalize waqfs and make them irrevocable, then the implication here is that certainly those

31. Ibn Nujaym, *al-Baḥr,* 5:243.

divergences, *as far as their content goes,* did not mean that much anymore in Ottoman times, and their only relevance was purely technical—as procedural fictions. Another equally important and related approach would also look at those arcane divergent opinions as effective in terms of court procedures, but would also go a point further and see in them a more serious tension between *property* versus *possession* (or *occupation*), or, following a more legal jargon, between property rights and contractual rights. In short, the high costs and risks in keeping private property legal has led towards a legalization of all kinds of possessory (or "occupation") rights, which in turn were expressed, for waqfs and mīrī, as contractual rights. Thus the complexity of the Ḥanafī law of contract has outpaced a more rigid property law so that property rights were eventually expressed, through the procedural fictions of the courts, as contractual rights.

The broadest definition of waqf would be that of a property "whose *'ayn* has been blocked from circulation on behalf of the ownership of the founder [*ḥabs al-'ayn 'ala ḥukm milk al-wāqif*]."[32] Thus, the *'ayn,* or the tangible object that constitutes the physicality of the property as such, is blocked, which means that it is not the ownership of a person anymore—not even the founder—or an institution for that matter. What keeps circulating, however, are the revenues, that is the movable property that is generated from the immovable property itself, and it is the trustee (or administrator: *mutawallī, nāẓir*)[33] who is in charge for leasing the properties and distributing the revenues among the beneficiaries. The waqf was therefore primarily an economic function that falls within the law of contract since it contractually links to perpetuity three parties together: the founder through his waqfiyya, the trustees, and, finally, the beneficiaries, and once their line is exhausted, the poor of a certain locality. Were it not for the waqfiyya, and considering the number of individuals involved at one time, such a contractual arrangement would have taken considerable time and would have been economically inefficient. From our perspective, a couple of questions are of interest to us. First, considering that private properties were permanently blocked and transformed into waqfs, was the major aim of such a process to "protect" those properties? In that case, should the waqf be primarily considered as a form of private property whose status received a permanent legal protection? Second, how economically viable were contractual arrangements that tied different persons and a portfolio of properties together? Finally, could the divergences among the Ḥanafī founders be reassessed in

32. Burhān al-Dīn Ibrāhīm al-Ṭarābulsī, *al-Is'āf fi aḥkām al-awqāf* (Beirut: Dār al-Rā'id al-'Arabī, 1981), 7.

33. The waqf could be entrusted to two administrators, a *mutawallī* who has a direct control over the revenues, and a *nāẓir* who acts as a supervisor to the administrator.

terms of economic efficiency, or should we keep them within the realm of legal discourse and its arcane—and, at times, obsolete—distinctions?

Ḥanafīs distinguish four components for a waqf, which include anything from the statements and meaning of the waqfiyya, its founders (*ahl*), the properties as such, and its purpose (*ḥukm*). Regarding the properties, referred to as *maḥall al-waqf,* they legally are a *māl mutaqawwam,* commodities whose exchange is legally protected, meaning that, once exchanged, they follow a strict liability rule.[34] Scholars and lawyers would generally agree on the validity of the concept of waqf—that it is permissible to block properties as waqf—but disagree on what the prerequisites (*luzūm*) are. Hence some of the major differences among the Ḥanafī founders. Thus, a major issue was the revocability, which only Abū Ḥanīfa had acknowledged: a property is "borrowed" (*i'āra*) to the waqf and its *'ayn* is kept to the founder; the latter can thus revoke his waqf at any moment, and even if he doesn't, upon his death, the waqf is self-revoked and its properties are distributed among the founder's inheritors. Thus follows the few legal devices that we have been accustomed to, and which all come in slight variations, in order to render a waqf irrevocable (C 6-1 & 6-2), namely that a judge rules for the trustee-defendant who, based on the principles of Abū Yūsuf and Shaybānī, would claim the validity and irrevocability of the waqf. Such was not only standard practice in the courts, but was acknowledged in the Mamlūk and Ottoman literature too.[35] But was that one disputed area among several, such as whether both movable and immovable properties could be blocked as waqf, or whether the same rules would apply to commonly owned property as *mushā'* (C 6-2), and the act through which the waqf would be acknowledged as legally instituted. Regular speech would be enough for Abū Yūsuf, while Shaybānī required that the *'ayn* be received by the trustee.

Such discrepancies were widely used as legal devices in the sharī'a courts to render waqfs valid and irrevocable. But beyond the fictitious procedures that they engendered, what was their significance? The root of the problem lies in knowing which properties were eligible for a waqf conversion. Granted that both movables and immovables could become endowed as waqf; the real pressure, however, was on landed properties, and in principle only *milk* lands could be donated (those that were also specialized in grains rather than plantations). But that was only in principle, since, considering the high costs in maintaining a privately owned rural land, Ḥanafīs did approve that lands that were "possessed" be endowed as waqfs. Had this not been the case, and had the law insisted that only pure milk properties be donated, then "many of

34. See *supra* Chapter 3 on contracts.

35. Ṭarābulsī, *Is'āf,* 7.

the present waqfs would become invalid had the rule of 'occupancy' not been acknowledged."[36] Basically, the same rules that we've already encountered for other types of properties—both milk and mīrī—apply, which means that the law only looks at who the actual accupant is, regardless of who might have been the "genuine" landowner.[37] This seems like a direct acknowledgment of the difficulty of maintaining and transferring a privately owned property in such societies. Thus, while the possessor only needs to prove that he has been occupying the land for a period of time to make his "occupation" legal, he can transfer his right—either of ownership or possession, depending on his legally established status, through court action—to family members and heirs, but he cannot sell the land as possessor.

We have already encountered the notions of possession and occupation in many cases before, and, invariably, as far as procedure went, the defendant was accused of illegally occupying a property, which, translated in the language of the courts as an illegal *waḍ' yad,* while the plaintiff's urge was the defendant's *raf' yad.* And even though such disputes were usually family-centered (C 5-1 & 5-2), they could well extend beyond the clan with unrelated plaintiffs and defendants (C 7-1 & 7-2). It was the ubiquitous nature of possession that made it endemic in all kinds of court cases. In fact, one of the most poorly understood aspects of waqfs is how tied they were to possessed—rather than genuinely owned—properties. Waqf founders should in principle donate to perpetuity only a fully owned property; but, even though it is hard to assess a reliable percentage of properties converted from milk to waqf, it is nevertheless safe to assume that the general rule did apply mostly to urban areas, while the countryside was dominated with possessed properties. The essence of waqfs was therefore less the "protection" of private properties—since those were anyhow hard to protect—and more the conversion of possessed properties into the status of waqf—hence the badly needed procedural fictions that would confirm the irrevocability of a waqf. The founder would thus create a portfolio of owned and/or possessed properties—and the latter could have been mīrī in origin—whose locations (urban and/or rural) could be as diverse as the properties themselves (lands, homes, shops, etc.). Whether such an arrangement was economically efficient is hard to assess, especially considering that waqfs might be efficient on a short-term basis but inefficient on the long run. The reason for this was that waqfs had to compete with the low rents of mīrī lands, a phenomenon that we've discussed earlier in conjunction with Ibn 'Ābidīn's evaluation of custom and his connecting it to the politics of the *iltizām.* (Regarding the excessively low rents and their corresponding

36. Ṭarābulsī, *Is'āf,* 48.

37. See *supra* Chapter 4 on land-tenure.

lump-sums deposits, see Chapter 3 *supra*.[38]) In fact, multazims had to pay prodigious sums simply to get on the job, and whose equivalent could only be extracted by extortion from the surplus, so that the "rent" as such—an equivalent to the official mīrī—that could be imposed on the peasantry became minimal, and that, in turn, lowered the waqfs' rents. Hence the large number of procedural fictions that attempted to limit the damage, such as the *marṣad* (C 3-6), sharecropping (C 3-11), and long leases,[39] all of which aimed at bypassing the falling value of rents.

Waqfs were thus the prime domain of the *'ulamā',* a space that would provide them with protection from the abuses and uncertainties of the *iltizām-mīrī* system. But since the *'ulamā'* came into several factions, and were part of the urban *a'yān,* some families profited from properties that were granted to them as iltizām, and were thus unable to create a political, economic, and legal culture of their own, one that would be autonomous from the needs of both local and central Ottoman bureaucracies. Nevertheless, despite all bureaucratic intrusions, the culture of the sharī'a courts was one that the *'ulamā'* were accustomed to and controlled fully, even though the juristic discourse was by then mostly based on *taqlīd,* and thus lacked the vividness and political aspirations of the high caliphate period.

The grammars of "privacy" and filiations

[C 8-2] Our second Beirut case involves a litigation over an inheritance within a single family.[40] The plaintiffs were the two sisters Asmā' and Khān, daughters of Muḥyī-l-Dīn Ghalāyīnī, and were represented in court by 'Abdul-Raḥmān Bayḍūn. The defendants, 'Abdul-Ghanī and Sa'īd, sons of Ḥājj Amīn Mīqātī, were maternal uncles (*khāl*) to the plaintiffs. The litigation was over the inheritance (*irth*) of the plaintiffs' mother, Zaynab, the sister of the defendants. Upon her father's death, she should have inherited at least half of

38. See *supra* Chapter 1 on customary practices.

39. Ṭarābulsī, *Is'āf,* 67, notes that in homes that were part of a waqf portfolio, "the lease should not extend beyond a year, with the danger of making the waqf invalid, because for a longer duration, the tenant begins behaving like a landlord, thus becoming the de facto real one." Thus, even though the concern here was with the ubiquitousness of "occupation" and its possible metamorphosis into a full ownership, the other unmentioned concern was the fluctuation of prices, which, in such societies, tended to be more frequent and haphazard than in market economies in the short run, but more stable in the long run. The remedy was either a lump-sum investment in the waqf's property as *marṣad,* or a sharecropping contract that would be at least partially in kind, or else a long lease that the administrator would accept on the proviso of a prior investment in the waqf by the tenant.

40. Beirut sharī'a courts, unnumbered register and document, 12 Jumāda 1266 (26 March 1850).

the share of each one of her brothers, the defendants ʻAbdul-Ghanī and Saʻīd. She got married to Muḥyī-l-Dīn Ghalāyīnī and begot three children, ʻAbdul-Raḥmān, Asmāʼ, and Khān, the last two were the plaintiffs. The latter requested from their uncles their dues from their mother's inheritance and brought two witnesses who were knowledgeable of their mother's part of the inheritance (*matrūk*). Also present was the father of the plaintiffs and their brother, both had no representatives, and apparently all were holding a common complaint against the two uncles.

According to the plaintiffs, upon his death, their grandfather, Amīn Mīqātī, left an inheritance consisting of a set of five properties (a *bustān,* a house, and three shops in Beirut)[41] to be divided among his wife, his two sons (the defendants), and four daughters. Concerning the share of their mother Zaynab, she should have had two and five-eighths qīrāṭs from the "garden," house, and two shops in Sūq al-ʻAṭṭārīn ("Market of the Perfumers"); as to the *Ḥānūt* in Sūq al-Fashkha ("Market of the Step"), her share should be one and one-eighth and the eighth of the eighth and the half of the eighth of the eighth qīrāṭs.[42] The plaintiffs then explicitly requested from their uncles their mother's share back (*raf' aydīkumā 'ammā dhukir wa-taslīmihi li-jihatunā,* put your hands away from what has been mentioned [the five properties] and give it back to us [the plaintiffs]).

41. See Table 8-2.

42. The document does not explain why the shop in the Sūq al-Fashkha is listed separately from the rest of the inheritance. Note that the shop was only partially owned by the heirs of Amīn Mīqātī. See Table 8-3 for a comparison of Zaynab's shares according to the different versions of the two parties in the two related cases under consideration (1836 and 1850).

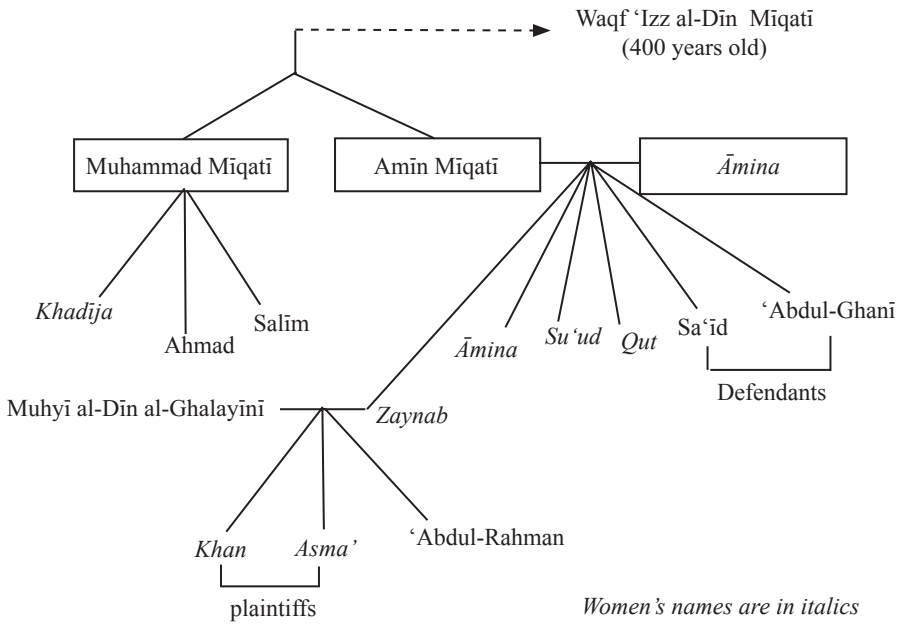

Figure 8-3. Inheritance of Amīn Mīqātī (C 8-2).

Commentary: A key element in understanding this case is the realization that the two plaintiffs, daughters of a Ghalāyīnī, were no longer eligible to become beneficiaries in a waqf that was originally accorded to the Mīqātīs, viz. their mother's family.

The defendants for their part claimed that they had bought from their sister Zaynab her share in the *bustān,* one plus two-eighths and half of the eighth qīrāṭs; the *bustān,* according to the defendants, was only half-owned by their father (and not entirely as the plaintiffs claimed), the other half was the property of their three paternal cousins, Aḥmad, Salīm, and Khadīja. They also claimed that they had purchased her share in the *Ḥānūt* of Sūq al-Fashkha, the same share that the plaintiffs had claimed she should have inherited from her father. All this was paid to her for a "known sum" (*bi-thaman qadruhu maʻlūm*).

> We had previously made the purchase known [*rāfaʻnā*], after the death of our sister, your inheritor, to the ex-qāḍī of the city of Beirut, the deceased Shaykh Yūnis Efendi Bizrī, and he certified [*athbata lanā*] the above buying of properties right in front of her husband Muḥyī al-Dīn [Ghalāyīnī], and also made the acts of buying and selling legal [*ṣaḥīḥ*], and has forbidden [*manaʻa*] her husband, who is also one of her inheritors, [any claim on the purchased properties]. And they showed a *ḥujja* [legal act] signed and sealed [*mamhūr*] by the above mentioned deceased qāḍī, and it was publicly read in the majlis [in the courthouse].

At this point, the main narrative describing the suit between the two sisters, Asmā' and Khān Ghalāyīnī, and their maternal uncles, 'Abdul-Ghanī and Sa'īd Mīqātī, over the inheritance of the mother of the former, Zaynab Ghalāyīnī [originally, Mīqātī], temporarily stops and gives way to another narrative, an older suit, dated August 14, 1836, and fourteen years older than the actual one, between the husband of Zaynab, Muḥyī al-Dīn Ghalāyīnī as plaintiff, and with the same two defendants as above. It was this first suit, lost by the plaintiff, that proved, through a *ḥujja* provided by the qāḍī, that the two defendants had purchased the above properties from their sister. This is a classical technique in the court system where a narrative is "rescued" by a former one usually consisting of an older case with a final decision in favor of one of the two parties in the newer (latest) suit.

An older case

The older 1836 case[43] was between the husband of Zaynab as plaintiff representing himself and his minor children, and the two defendants 'Abdul-Ghanī and Sa'īd al-Mīqātī. Thus, while the defendants were the same in the two cases, on the plaintiff side, it was originally the father, and fourteen years later his two daughters, now at the age of maturity (*rāshidūn, bālighūn*) who took his case. It is not clear, however, whether the re-opening of the older case has anything to do with the two daughters not being minors (*qāṣirūn*) anymore, or for a totally different reason.

The basic issue is fundamentally the same in the two cases, namely the inheritance of Amīn Mīqātī, to be divided among his two sons (the defendants) and four daughters, and in particular Zaynab who died after her father. Even though we have a double inheritance, first from Amīn to Zaynab and then from the latter to her inheritors (the plaintiffs), the real issue is limited to determining Zaynab's inheritance from her father: How much did she exactly inherit from her father, and what is the current status of those inherited properties? The plaintiff refers only to two properties, one is a shop (*dukkān*) whose description seems close to the *ḥānūt* identified in Table 8-2 as #2, and the second is a vineyard (*karm*) which seems close to the *bustān* identified in #1[44] (both properties were shared with her cousin), which were, according to him, illegally "occupied" (*waḍ' yad*) by the two defendants. Concerning the shop, her share should have been, according to her husband the plaintiff, one

43. Dated 1 Jumāda I 1252 (August 14, 1836).

44. See Table 8-2.

and one-eighth qīrāṭs plus the eighth of the eighth and half of the eighth of the eighth qīrāṭs. As to the *karm,* her share should have been one and one-fourth plus half of the eighth qīrāṭs.

The defendants acknowledged that they had occupied (possessed) their sister's two properties as described above, but that was not achieved, according to them, through an illegal act of usurpation (*ghaṣb*) but by a legal purchase (*shirā' shar'ī*) directly from their sister Zaynab, and this for a "known sum" that was paid to her (*bi-thaman ma'lūm maqbūḍ*).[45] Then, at the request of the plaintiff, they brought to court three witnesses: Muḥammad 'Alī b. Ḥājj Raḍwān al-Shaykh and his wife Qūt, and her sister; the two sisters were the daughters of Amīn Mīqātī and also sisters of the defendants. Their testimonies, which basically repeated the allegations of the defendants, were accepted by the qāḍī as valid. The qāḍī also gave the defendants a written *Ḥujja* proving their purchase of their sister's two properties. The second narrative closes at this point and we go back to the original main one.

Having solved the status of two properties (Table 8-2, #1, 2), there still are three others, a house and two shops, whose fate remains to be determined. The defendants claimed that the three properties belonged to a four-hundred year old waqf founded by their grandfather 'Izz al-Dīn Mīqātī. The founder had requested that the revenues of his waqf be distributed among all his descendants, with the males receiving twice the shares of the females. At the moment of the hearing, the only descendants were the two defendants (*naḥnu*)[46] and their cousins, the three children of Muḥammad Mīqātī. As to the plaintiffs, they were not considered, according to the defendants, as part of their grandfather's and father's descent because they were the "children of foreigners" (*awlād al-ajānib*), meaning that their father was from a family other than the Mīqātīs, and that the waqf's system of descent being patrilineal, what counted was the father's relation to the founder, which in this case was null.

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45. Quite often, in the sharī'a courts, the purchase of property is neither accompanied by a written document (*ḥujja*) nor by the specific sum for which the property was purchased (C 5-1 & 5-2). Thus, even though the Qur'ān 2:282 made it mandatory to legalize transactions in writing, this habit was never fully followed and, as early as the first or second century A.H., Islamic courts accepted both written and oral acts of transactions (see Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 188). Thus, even though it is perfectly legal, from a Ḥanafī perspective, to legalize purchases of property on the basis of an oral process of validation (usually through witnesses), it remains extremely important for a textual approach to the sharī'a courts which focuses on their discursive and non-discursive practices, not to take this process of accepting oral testimonies for granted and to question it on the basis of determining how the social agents deploy their strategies in court in the way they "decide" what to come forth with as plain "evidence" and "proof," that is, to question the foundations of their "truth"-claims.

46. By referring to the descendants of Amīn al-Mīqātī as "us" (*naḥnu*), meaning the two defendants, the presumption here is that their four sisters were dead.

From their side, the plaintiffs denied that the above three properties were waqf and also denied that the written *ḥujja,* showing that two of the five properties had been purchased by their uncles, was legal, which prompted the defendants to bring to court, first, four witnesses showing the authenticity of the *ḥujja,* then, seven additional witnesses certifying the authenticity of the very old waqf of the Mīqātīs. The qāḍī, having accepted all testimonies, declared the waqf as *ṣaḥīḥ,* and the complaint of the two plaintiffs as null and void because the revenues of the waqf should go only to the defendants and their three cousins. The others, the children of Muḥyī al-Dīn Ghalāyīnī, had no legitimate rights in the waqf because they are from "outside" the family. This turned out the most decisive element in the process of decision making, to the point that the qāḍī requested the personal opinion from the muftī of Beirut, Shaykh Muḥyī al-Dīn Yāfī, who decided that the children of the woman Zaynab could not be within the waqf's beneficiaries because the descendants of the founder are "referred to their fathers rather than their mothers" (*mansūbūn ila ābā'uhum duna ummahātuhum*).

Property claims and rights

From a legal point of view, the main issue for the qāḍī was to determine the status of Zaynab's properties: Did she have any right to any or all of the properties that her inheritors claimed she should have inherited from her father? And if so, which ones? As it turned out, and considering that Zaynab had no rights in any of the five properties, only the first question was relevant. Thus, even though several conflicting share assessments came to light (see Table 8-3 *infra*), the crucial issue remained whether Zaynab had any rights, *ab initio,* in any of the five properties. It is therefore more appropriate to ask: What were the accepted procedures (if any) that would have proven that a legitimate heir had any rights in a given property? But, again, this turns out to be a misleading issue since, right from the beginning, the defendants shifted the case to something else and became more concerned in proving the legitimacy of buying a set of two properties from their sister prior to her death. The defendants thus became concerned in proving that they had bought, prior to 1836, the two disputed properties from their sister. Thus the case re-focused itself on a different issue now: What kind of evidence is needed for the purchase of a property from a now deceased person? Of course, a written document could have proved more than enough, but, as usual, that was not the preferred method of the disputants.

Then, concerning the three other properties that the plaintiffs were also claiming, another surprise came out that made these properties part of a very

old waqf, hence inalienable in the first place. Furthermore, Zaynab, as the daughter of Amīn Mīqātī, was a legitimate beneficiary, but now that she was deceased, her husband, two daughters, and son have no such rights anymore because they were from another family, the Ghalāyīnīs.

What we thought at the beginning should be our main line of questioning—whether Zaynab had any legitimate rights in any of the properties—turned out to be, *in appearance,* two different lines of inquiry. One on establishing sufficient evidence that the property was purchased from a now deceased person when no written sale documents were available; and the other on establishing that the heirs of a deceased person have no legitimate rights in the waqf of that person's great-grandfather of four-hundred years. The two lines of arguments need to be analyzed separately first, to see whether or not there is a common denominator between two levels that seem, at first glance, unrelated.

A legitimate narrative

Every sharī'a court document narrates a story that stretches in time and space and has a beginning and an end. In fact, while literary narratives may or may not have happy endings, legal narratives *must* come to a conclusion, which usually favors one side over another. Legal narratives also have to obey two sets of writing and composition: one that follows the most general cognitive rules related to mind, language, and culture, and hence follows the structured composition rules in terms of categories, narratives, and rhetoric; while the other is restricted to the legal apparatus itself and its rules of writing and discourse, some which we have already briefly discussed, namely analogy, metaphor, label, and doctrine. The relevant question then becomes, What is it that makes a court narrative legitimate? And on what basis is a *specific* narrative accepted as legitimate?

Before I specifically turn to the issue of *court* narratives, I need to point out here that the "judicial apparatus" was a complex enterprise comprised of several discursive levels that neither have to overlap nor be congruent with one another. The important thing to remember is that the modes of legitimation and discourse construction for each level could be quite different. Thus, even though the courts in their practices have to use the judicial treatises of the fuqahā' and their fatwās for analogy and legal doctrine, they nevertheless follow a different construction while making their own discursive practices sound legitimate. This is not so much a didactic presupposition as it is a methodological cautionary statement suggesting that the discursive practices of the courts are not set once and for all by the discourse of the fiqh; in other

words, the courts do not simply "apply the law"; we have to look, in a court document, beyond what the "law has to say" on a specific issue. Similarly, one could postulate that with the two levels we have just mentioned, the discourse of the fiqh and the discursive practices of the courts, there are other discursive forms that we have already discussed in great length in separate chapters. Thus, the regional reform councils have constructed a discursive form free from the constraints of the fiqh, or at least while keeping an eye on the fiqh, they will have to adjudicate beyond the procedural limitations of the sharī'a courts (see Chapter 9 *infra*). In short, the councils were not limited to judicial decision-making, but extended that activity to *policy making* as well, a step that required a revised discourse construction, one that would have granted the group of notables-cum-judges an aura of respectability and legitimacy. Similarly, sultanic legislation had a more commanding attitude than any of the texts we have encountered, and it was in turn free of the jargon of the fiqh, with more actual concerns than Ḥanafī practice, which limited itself to a sort of "special private law." All along, we have attempted to follow the overlap (or lack thereof) of tensions and inconsistencies, and, at times, the incongruence between those various "legal" levels.

If the courts did not purely and simply "apply the law," what was it that they did exactly? One way to find out is to see what makes their narratives legitimate. As a general rule, the discursive practices of the courts are concerned with "proof" and "persuasion": Is there enough evidence that a particular "fact" occurred as claimed by one of the parties? What does constitute enough "proof" for a particular case, and more broadly, for the system of justice as a whole? How does a court construct a system of "proofs" and on what basis? And since "we"—as "modern" observers in the social sciences—belong to different narrative systems with different "truth"-claims, a relevant questions would be, How do the Islamic and Ottoman systems of justice—in their truth-claims and construction of narrative and rhetoric—compare to ours?

The main concepts thus far are: legitimate narrative, proof and persuasion, and truth-claims. Whenever a court is involved in a litigation process, it requests that both plaintiff and defendant narrate their own version of the story. We thus have two different—quite often contradictory—narratives, and only one shall be legitimized by court action, but only when plaintiff or defendant have provided the court with enough evidence. On the other hand, individual statements uttered by plaintiffs, defendants, and their representatives and witnesses (if any), which could prove persuasive or not, are not in themselves "proofs" or "proof systems." They rather are performative and denotative statements with various truth-claims, and a set of truth-claims would in itself represent enough evidence. The legitimacy of a court narrative—that is, the *constructed* "document"—rests mainly on what is accepted as enough

evidence from both parties. As such, it is such a system of proof that makes a court narrative look legitimate—at least in the eyes of the beholder. Since it was solely the qāḍī's responsibility to determine what was enough evidence, his final decision-making brought together all the quintessential aspects of the legitimation process. First, he determines whether the individual truth-claims of the two parties (including their witnesses) represent enough evidence. Second, he needs to narrate the entire "story" in a way that "makes sense," and it is at this point that legal doctrine and opinions of the fuqahā' might become decisive. It is therefore the combination of all these elements that makes the constructed narrative legitimate.

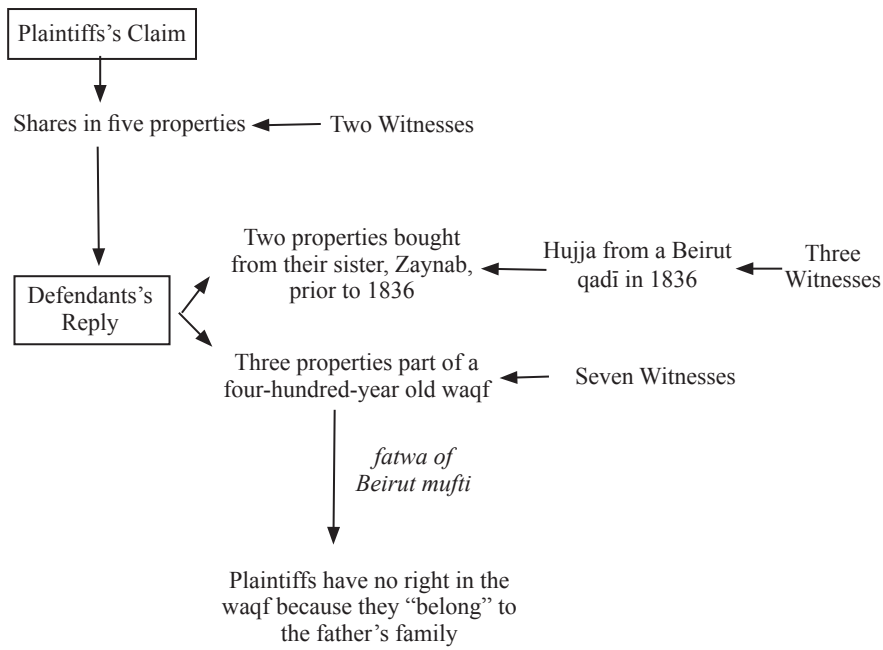
Plaintiffs's Claim
Shares in five properties
Two Witnesses
Defendants's Reply
Two properties bought from their sister, Zaynab, prior to 1836
Hujja from a Beirut qadī in 1836
Three Witnesses
Three properties part of a four-hundred-year old waqf
Seven Witnesses
fatwa of Beirut mufti
Plaintiffs have no right in the waqf because they "belong" to the father's family

Figure 8-4. Arguments in the Case of Salīm Mīqātī (C 8-2).

Commentary: The main concern in this case was the "right of filiation," or which factors do contribute in determining a "genuine" or "strong" "agnatic affiliation." Evidence came strongly as usual in the form of witnessing, and the case was sealed thanks to a muftī's fatwā.

The use of language

The study of the language of the court documents leads to a careful examination of the ambiguities and meaning of some key words and sentences (mostly related to the history of the fiqh and its procedures). Such an approach,

however, even though useful and necessary *as a first step,* rarely tells us anything about the discursive construction of a text. It rather contributes to a first-hand translation and construction of the text from one language to another, that is, from the language of the qāḍīs and their scribes to something more familiar to "us." Words and statements that made perfect sense to their authors nevertheless lost their meaning over time, and the enterprise of re-constructing the meaning of individual words, concepts, and statements is well-known in any hermeneutical exercise, and usually serves as a preliminary assessment of the text before it is subject to additional interpretations. In the case of court documents—and the same applies to *any* text—even though such an enterprise proves fruitful at times, it would remain incomplete and miss the essential if not re-assessed by what J.L. Austin refers to as *the use of language.*[47] What in fact a classical analysis of words and statements and their meaning misses is precisely their *performative* value in a concrete situation. This is especially true of court documents because they were originally based on hearing sessions, and only *later* transformed, by qāḍīs and scribes, into the heavily edited "summaries" we are familiar with. Yet, despite their existence *to us* in a summary form, they contain—since based on actual hearings—more than a pure juxtaposition of statements with logical and grammatical interconnections. In fact, what a classical analysis of word-meaning does is the reduction of all *utterances* into *statements,* that is, into sentences that are either true or false. However, Austin's linguistic theory places the focus on *performative utterances;* that is to say, on how statements, once uttered (or written), *perform,* and only a small fraction of the latter, in daily speech, could be reduced to *descriptive* statements on a true/false basis. In other words, individuals in their daily lives are more interested in *performing through language* than in simply describing things with particular truth-claims. Moreover, the "reception" of a particular text—or what Austin refers to as the *perlocutionary*—varies form one "audience" to the other in space and time, and hence is never determined once and for all in terms of its "content."

This is even more true of court hearings—and their corresponding documents—when disputants have to *perform*—through linguistic communication, and also, by means of their "body language." Thus, even though court procedures should in principle solely focus on the veracity of

47. J.L. Austin, *How To Do Things With Words* (Oxford University Press, 1962, 1975), 103ff. There are three levels of speech according to Austin. (1) The *locutionary,* which is the content of an utterance; (2) the *illocutionary,* which points to what the speaker is doing with the uttered proposition (e.g., *declaring* that she will get married); and finally, 3) the *perlocutionary,* or the effects of the utterance on the hearer. The point here is that linguistic theory has generally treated utterances as propositions with true/false claims, thus ignoring both the speaker's "act" while uttering, and the hearer's reception of that speech-act, both of which are based on that situational encounter rather than solely on the content of speech.

statements, it is the combination of the *illocutionary* and *perlocutionary* force of statements that finally matters. In effect, the construction of narratives and their respective truth-claims and legal reasoning, together with the linguistic categories that they deploy, are of fundamental importance in understanding both the legal and linguistic nature of court documents. However, our mission would by and large remain incomplete without a perceptive look at the *rhetorics* of the court hearings, or the use of language within the space of the courts.

What shall follow are only preliminary attempts towards an understanding of court documents in terms of *speech act* theory as it is often referred to now.[48] We should keep in mind, however, that an analysis of court documents in terms of speech act and language performance is only *one* interpretive level among others (cases throughout this study have been mostly approached from the vantage point of legal theory and history). Furthermore, speech act theory as applied to court documents varies in its effectiveness, especially since we are relying on *written* documents without first-hand access to the utterances in the court hearings. In fact, speech act theory, as we describe it, is primarily concerned with real-life situations rather than texts as such, and the heavily scripted court documents do indeed look seem distant from the regular concerns of such a theory. Yet, the challenge lies precisely in being able to apply speech act theory (and other related linguistic theories) to a domain as convoluted as the sharī'a courts (and other "legal" texts), and to examine their "scripts," which repeat themselves ad nauseam from one case to another, in terms of their "performative" side. At its best, that implies the vulnerable assumption that all statements of the disputants, witnesses, and the judge himself, as scripted in the document available to us (and our knowledge of each case derives solely from those documents and nothing else), all share a "performative" and "rhetorical" side that is worth examining in conjunction

48. For more recent views based on Austin's insights, see John Searle, *Speech Acts: An Essay in the Philosophy of Language* (London: Cambridge University Press, 1969); Jean-François Lyotard, *La condition postmoderne* (Paris: Éditions de Minuit, 1979), 20-24; Stanley Cavell, *A Pitch of Philosophy: Autobiographical Exercises* (Cambridge, Mass.: Harvard University Press, 1994), Chapter 2; Paul Ricœur, *Soi-même comme un autre* (Paris: Seuil, 1990), Chapter 2; Ricœur prefers to translate "speech-act" by *"acte de discours"* to differentiate between "speech" and the more general use of "language"; that would also bring "speech," as elaborated in this chapter, closer to our notion of "discourse" which is that of "discursive practice"; see also, Jürgen Habermas, "What is Universal Pragmatics?," in *Communication and the Evolution of Society,* translated by Thomas McCarthy (Boston: Beacon Press, 1979), 28: "Whereas a grammatical sentence fulfills the claim to comprehensibility, a successful utterance must satisfy three additional validity claims: [1] it must count as true for the participants insofar as it represents something in the world; [2] it must count as truthful insofar as it expresses something intended by the speaker; and [3] it must count as right insofar as it conforms to socially recognized expectations."

with the strictly legal and linguistic contents of each case. Only then would a "case" end up as something more than just a legal case, and part of a conundrum of discursive practices that determine how we think and act.

How "cases" are constructed

It is quite common in court documents to begin the description of an "action" with the verb *ḥaḍara fulān,* meaning that so-and-so came to the courthouse either to file a complaint or simply to have a transaction officially validated and recorded. Thus, it is the verb *ḥaḍara* that triggers all actions to follow.

> Ḥājj ʻAbdul-Raḥmān Bayḍūn came to court as representative of Asmāʾ and Khān Zādah, daughters of Muḥyī al-Dīn Ghalāyīnī, to initiate their suit [*al-daʻwa*] and litigation [*khuṣūma*] against their two uncles Ḥājj ʻAbdul Ghanī and Ḥājj Saʻīd, sons of Ḥājj Amīn Mīqātī. He thus claimed that the two [plaintiffs'] shares from their maternal uncles in relation to the inheritance of their mother Zaynab [*al-munjaz ilayhā bil-irth al-sharʻī*] from her father Ḥājj Amīn, were kept with the defendants, and that was confirmed by Ḥājj Muḥammad b. Ḥasan Zayn and Ḥājj Muḥammad b. Bakrī Ṣaḥ, both of whom had known her in accordance with the law [*al-maʻrifa al-tāma al-sharʻiyya*]. Was also present their father Muḥyī al-Dīn and their brother Ḥājj ʻAbdul-Raḥmān, both of whom acted on their own behalf [*al-aṣīlān ʻan anfusihimā*], and all filed a complaint, based on their own and representative rights [*bi-ḥasab al-aṣāla wal-wakāla*], against the two brothers ... who were also present at the majlis [that is, the courthouse], claiming in their suit against them and emphasizing in their address [*khiṭābihim*] that you owe us from the inheritance [*matrūk*] of your father Amīn Mīqātī, the father of the plaintiffs' inheritor, [follows the list of properties in Table 8-2] ...

The main purpose of such a typical introduction is to introduce and identify—often in terms of *nisba,* which could be anything from religious, to professional and geographic affiliation—first the qāḍī, his "signature" and "seal" (even though that was not completed here[49]); and the two disputants and their representatives (if any). Since only the plaintiffs had a representative, there was no need to go through the tedious process of "identification and status confirmation" usually performed on the representative of the defendant(s), in

49. As noted earlier, a more conventional way of introducing a litigation would be "In the court of judge and deputy judge so-and-so, in the city of Beirut, X complained against Y on the following matter..." The *ḥaḍara* form discussed above, even though less common than the more conventional one, does not in itself signal any deep change and should be taken as a purely formal alteration which has more to do with the contingent circumstances of the case.

particular if the burden of proof is on them, prior to winning their case.[50] The other outright emphasis is on the *khuṣūma,* that is, a litigation that would pave the way to a ruling.

The first question that comes to mind is "Who speaks?," and there is a first obvious answer: it is the qāḍī and/or his scribe. This seems to be a fair answer on two grounds: (i) from an *empirical* point of view, *someone* should have drafted this document and this person could only be the judge or his scribe; (ii) by appending a "signature" and "seal" to each document, the text is then de facto tied to a particular person (the qāḍī). Such assumptions, however, even though convincing, could be misleading. The real issue at stake here is whether there was any "individuality" to the qāḍī who drafted the document or whether it was part of a more common—"anonymous"—language used by many qāḍīs alike regardless of what the case was all about. I tend to favor the "anonymous" interpretation on the ground that it does not help much to speak in favor of a qāḍī who drafted a document when no such "I" really exists. I shall therefore proceed with the assumption that even though court documents were drafted by individual qāḍīs, they belong more to a wider formalized and scripted template (or "sample") through which it would be hard to discern *individualized* thoughts and writing patterns. As Austin rightly noted, in written utterances (or "inscriptions"), appending a signature *has to be done* because "written utterances are not tethered to their origin in the way spoken ones are."[51] Which means that having a signature appended to a document ("text") is not that much different from a *speaking* "I" and does not tell us much about the *uniqueness* of the individual who "signed."

Most statements in court documents are in a third-person form. They could thus be labeled as *descriptive* statements, that is, as non-performative, and whose only value is to inform us of "what has happened." They could therefore be classified as true/false statements. Thus an opening of the form "so-and-so came to court representing X and complaining against Y" is always in a third-person singular or plural and purely descriptive, that is, it describes an action that could have taken place (true statement) or not (false); and since there is no "I" or "we" at play here, they cannot possibly have any performative value. The truthfulness of such statements comes from the authority of the

50. See above the cases of Bashīr II (C 5-1) and Bashīr III (C 6-1). As a reminder, both involved a "fictitious debt" that paved the way for a ḥukm that would make the representative of the defendant legitimate in court. That only the defendant's representative needs to go through a check-of-identity process, while the plaintiff's representative is cleared out without any hassle, might also be an outcome of the procedural fictions in Ḥanafī practice which, in many instances, places the burden of proof on the defendant.

51. Austin, *How To Do Things,* 60-61.

qāḍī himself: he, as an authoritative person, makes us believe that such things did in fact occur, and we have no other choice but to believe him.

At times, third-person descriptive statements are punctuated by first-person (perlocutionary) statements. The last sentence in the above quote is one example: "...saying in their suit against them and noting in their address [*khiṭāb-ihim*] that from the inheritance [*matrūk*] of your father Amīn Mīqātī, the father of the plaintiffs' inheritor..." The latter part in particular, "that from the inheritance of your father Amīn Mīqātī, the father of the plaintiffs's inheritor...," seems to be a direct quote from an *oral utterance* made by the plaintiffs' representative—even though the statement, *in its written form,* is grammatically incorrect as is often the case in court documents. By saying "the inheritance of *your* father," the representative of the plaintiffs is here addressing himself *directly* to the two defendants without any intermediary (at least formally). The grammatical confusion comes in the second part of the utterance: "the inheritance of *your* father, the father of the *plaintiffs'* inheritor [*wālid mawrūthat al-mudda'īn*]," which should have been (if correct): "the inheritance of your father, the father of *our* inheritor [*wālid mawrūthatu-nā*]." There are several reasons as to why such grammatically incorrect statements often occur in court records. One of them is obviously the degradation in the use of the Arabic language even among qāḍīs and officials of similar rank and status. But, more importantly, the continuous shift from the third to the first person, and the grammatical confusion that it often provokes, enable the qāḍī to distance himself from what others had said in court. He thus keeps the third person for himself, for his own observations, comments, and final decision, and also to give the bare facts of the hearing sessions an aura of legitimacy. In fact, many of these statements are purely descriptive and should be taken on a true/false basis. The "I"/"We" type of statements, however, usually referring to utterances made by the disputants, are more problematic. In fact, in "performative utterances," as they are often called, the focus is no longer exclusively on true/false claims, but on the *intentions* that lie behind the complexities of a specific utterance. Even if the *oral* utterances of the disputants and their representatives are not similar to their *written* counterparts as recorded by the qāḍīs and their scribes, it is precisely their *performative role in the text itself* that needs to be carefully studied. Thus, *pace* Austin, we are extending for court documents the role of the performative to texts. This proves to be an important presupposition because the qāḍī might have twisted and transformed the verbal utterances of the two parties, partly because he was drafting only a scripted "summary" of the whole case and hearings that took place, and partly because the shift that operates between the third person and the I/We form is more figurative than real: it simply gives the qāḍī the opportunity to distance himself from the claims and witnessing of others,

and thus contributes in establishing an authority to the text. In other words, that authority is not established solely—if not mainly—from the apparatus of justice itself, its scholars, lawyers, and judges, but also from the way the legal jargon is used and constructed. Such constructions vary greatly between, say, a court document and a fatwā, or a regional council adjudication and a firman, not only because they emanate from different authorities and do not address the same persons, but also because the content of their messages is structured differently. They therefore have to "persuade" their recipients in ways that are much different from one another, hence the variations in the use of language that we've encountered while moving from one discursive type to another.

Our enterprise—extending the performative to texts—is worth the effort because most of the courts' statements can neither be reduced to their purely legal connotations nor problematized as true/false, especially in the absence of a "reality principle"—one that would have associated "facts" to an investigative fact-finding process.

The shift from the descriptive third person to the performative I/We takes place, in the above quoted introduction, just at the moment when the five sets of properties are listed. The list interrupts the plaintiffs' first claims.

> Upon his death, your father, Amīn Mīqātī, the father of the inheritor of the plaintiffs [more accurately: the father of our inheritor, Zaynab], [left as inheritance the following list of properties shown in Table 8-2]. Your father Amīn died and left [the above properties] as inheritance [*mīrāth*] for his descendants [*warathat-ihi*]: the two of you [defendants], his wife Āmina, and his daughters Qūt, Āmina, Su'ūd, and our inheritor, Zaynab. You are now illegally controlling [*wāḍi'ān aydīku-mā bilā ṭarīqa shar'iyya*] the share of our inheritor Zaynab, that is, what she should have received from her father's inheritance, and which amounts to the following [properties listed in Table 8-3, column #3]. We therefore ask you to give us back our shares [*raf' aydīkumā 'ammā dhukir wa-taslīmihi li-jihatunā*].

The plaintiffs' representative first intervention ends at this point, and is immediately followed by the two defendants' reply:

> The two defendants were then asked [to reply to the plaintiffs' representative's claims], and they claimed that they had purchased from their sister, the inheritor of the plaintiffs, her share consisting of [what follows is a list of properties with their respective shares as detailed in Table 8-3, column #4].

At this point, and after the properties are listed, the defendants' reply abruptly shifts from the third-person plural to a direct mode of speech addressed to the plaintiffs:

> We had previously addressed [*rāfa'nā*] [this problem of purchasing Zaynab's shares], after the death of our sister, your inheritor, to his honor, the then qāḍī of the city of Beirut and the now deceased Shaykh Yūnis Efendi Bizrī, and he

> validated for us [*athbata lanā*] the aforementioned purchase in the presence of her husband, Muḥyī al-Dīn, and he issued a ḥukm confirming the legality of the buying and selling [of Zaynab's shares], thus estopping [*mana'a*] the plaintiff, Muḥyī al-Dīn, who is one of [Zaynab's] inheritors, [to request any of the aforementioned properties].

The defendants' "direct" intervention ends at this point with the following note from the qāḍī:

> [The defendants] then showed a ḥujja signed and stamped [*mamhūr*] from his honor, the aforementioned deceased qāḍī, which was publicly read in the majlis [courthouse].

The document then inserts a verbatim copy of the previous *ḥukm* (1836), which ruled that the defendants had indeed purchased their sister's share as they have been claiming all along. But before proceeding to the older ruling, it is worth looking more closely at the plaintiffs' claim and its counter-reply. Even though the two parts, the claim and the reply, look like "direct verbatim quotes" from what the disputants had said in court, it would be wiser to assume that they represent very short "extracts" from much longer utterances. It is also wise to assume that such "extracts" had been "edited" by the qāḍī so as to leave only what looks "essential" for his case. Even though it would be impossible for us to know with even minimal certainty how the case was scripted, it nevertheless follows a common minimalist pattern—that of including as little as possible on the case of itself, and not allowing anything—not a single extra statement—that would not "fit" perfectly well with the judge's script. Moreover, the minutes of the hearings that would have included anything from examination to cross-examination, to the judge's own personal digressions, were never appended to any of the cases, so there clearly was a deliberately concerted effort not to provide the "reader" with anything but the text of the ruling.

Herein lies the whole ideology of the sharī'a court documents: the heavily scripted texts manifest a desire to bypass fact-finding procedures altogether, and replace them by a legitimate narrative. In fact, such societies were typically confronted by the high cost of information, that of finding and examining facts, assessing them, and decide what's genuine and what's false. As Richard Posner has perceptively argued, "High information costs are reflected in the reliance on oaths, ordeals, and other dubious or irrational methods of factual determination that are sometimes used in primitive adjudication."[52] This is why it is equally dubious to perceive the sharī'a court system in terms of a "rule of precedent." First, keeping track of precedent is a costly enterprise, one

52. Richard A. Posner, *The Economics of Justice* (Cambridge & London: Harvard University Press, 1981, 1983), 176.

that requires a substantive bureaucracy and army of scribes, not to mention the availability of a print culture that would reproduce and circulate various relevant rulings. In the old English common law, that cost was minimized thanks to the writ system, and it is unthinkable that in the highly archaic and decentralized sharī'a court system that a rule of precedent would have the slightest chance of surviving. Second, one could argue that a form of "precedent" exists, but albeit very indirectly in the scripted texts that judges apply from one case to another: this alone represents an enormous cost-saving device. Third, even though the sharī'a judges were for the most part recruited from the *'ulamā'* urban factions, they nevertheless were never part of a centralized judicial bureaucracy, one that would have at least created a more uniform judiciary. Judges thus adjudicated mostly on their own, with their own savoir-faire, and a minimal staff consisting of a deputy and scribe, and were, like their clients, private citizens. Considering then the information costs, unreliability of facts, and the low compensation, it does indeed seem unlikely that judges would circulate their rulings around so as to make them "public."[53]

Needless to say, all that is clearly reflected in the *writing* of each case. Even though the judge drafts his case so as to meet the disputants' expectations, and hence must reconsider his case individually, by the nineteenth century, cases had nevertheless to fit within well defined and predictable scripts, a cost-saving process that definitely contributed in meeting the disputants' expectations, and probably points to a much broader societal status quo.

The plaintiffs' major claim comes in two parts. The first describes and calculates the shares in the set of disputed properties, followed by another claim that these properties should have belonged to Zaynab *ab initio,* and should now be in her husband's and children's possession. Such statements, regarding the distribution and location of properties and property rights, need to be examined at two interrelated levels. On the one hand, and on the surface, they correspond to descriptive statements on a true/false basis: the lists of properties do certainly fall into this category, together with the different shares associated with them and the individuals and/or families to whom they belong—such information proves vital and is either correct or incorrect, that is, it should in principle be linked to a factual reality. But all such information is based on utterances performed by the representative of the plaintiffs who put forward claims whose veracity is still unknown and whose aim is beyond the purely descriptive. In fact, as soon as he *informs* the defendants on the status of these properties, he *orders* them to transfer the latter back to the plaintiffs (his clients). It is quite common to have plaintiffs (or their representatives)

53. Posner, *Economics,* 177: "The typical primitive judge, like the modern arbitrator, must look to the disputants rather than the society at large for his compensation, since he is a private citizen."

combine in their introductory speeches several speech acts together, such as informing, ordering, warning and undertaking. Austin calls such "utterances which have a certain (conventional) force," *illocutionary acts.*[54] Imperatives of the form "I am (hereby) requesting that you do so-and-so," are also understood on the model of perlocutionary acts, as attempts by an actor S (speaker) to get H (hearer) to carry out a certain action. In the context of the sharī'a courts, however, their function proves symbolic in that the plaintiff makes his point boldly and by directly addressing himself to the defendant, underscoring once more his point by requesting that the properties be given back to him. Of course, since that would only happen through a judge's ruling, the plaintiff's statements nevertheless retain their rhetorical effect and help in framing the litigation more forcefully.

The defendants furnished evidence consisting of a previous 1836 ruling, proving the purchase of some of Zaynab's properties. An appended and *written* document, signed and sealed by a qāḍī, brings a new dynamism to the case. To begin with, the document was appended to the oral utterances of the defendants, and thus becomes the only tangible element in their defense strategy. A text, especially when introduced in the midst of an oral exchange, furnishes evidence of a more reliable kind than simple witnessing, a process that associates the veracity of witnesses to status, rank, affiliation to the disputants, and social origins. But even though the document has an aura of its own, and once sealed, signed, and hard to challenge or revoke, disputants typically opt for evidence through witnessing, so that contractual settlements would be adapted to the circumstances of the case. And as the case develops, we will see how even the 1836 ruling had to be validated through witnessing, once contested by the opposing party.

The older 1836 text, which was publicly *read* in court (the document says *quri'at,* which makes it hard to see *who* read it), is inserted as part of the defendants' reply, but comes as a sudden transition, first, from the I/We form to the qāḍī's own narrative explaining that there was a previous ḥukm on the same issue, and which had to be read in court in order to be acknowledged, and finally, between the qāḍī's own narrative and the text of the older litigation that reads as a case-by-itself inserted in the defendants's reply.

> In the city of Beirut, in the court of the Ḥanafī qāḍī whose signature and seal are shown above,[55] Muḥyī-l-Dīn Ghalāyīnī b. Muṣṭafa Ḥalabī, representing himself [*bi-aṣāla 'an nafsihi*], and on behalf of his minor children, complained against the two brothers, Hājj 'Abdul-Ghanī and Sa'īd, sons of the deceased

54. Austin, *How to Do,* 109.

55. The name, signature (*imḍā'*), and seal (*khitm*) of the qāḍī are usually "inscribed" at the beginning of each *sijill.*

> Amīn Mīqātī, and now present in the majlis [courthouse]. [The plaintiff] noted in his address that Amīn Mīqātī died leaving behind [two male children, the defendants], his wife, and four daughters, Qūt, Āmina, Sa'diyya, and Zaynab [wife of the plaintiff] as descendants and inheritors. His inheritance was thus limited to the aforementioned legal descendants, and among them was Zaynab, my wife, who died after her father, and whose inheritance [from her father] now became my right and the right of my minor children from her. Amīn Mīqātī had left [the following properties as inheritance, listed in Table 8-3, column #2]. The defendants are now illegally controlling those properties and we summon them to give us back what [we should have inherited from Amīn Mīqātī via Zaynab].

And now the defendants' reply:

> When the defendants were asked on the veracity [of the plaintiff's statements], they acknowledged that their sister Zaynab had inherited from their father the aforementioned properties, and that they are now under their control [*waḍ' yad*], but all of which have been legally purchased from their sister when she was still alive, for a known sum that was paid to her. The plaintiff then denied the defendants' allegations and requested from them to furnish evidence. [The defendants] then left the courthouse and came back with their witnesses, Muḥammad 'Alī b. Ḥājj Raḍwān al-Shaykh, his wife Qūt, and her sister, both of them daughters of Amīn Mīqātī. They all witnessed in front of the plaintiff, Muḥyī-l-Dīn, that what [the defendants] had claimed as theirs was perfectly true as the result of a legal purchase from their sister Zaynab. ... The qāḍī [having accepted all testimonies] declared that the plaintiff had no legal rights in any of those properties and he issued a written *ḥujja* for that matter. ...

The older case ends at this point, and, as it should have become clear by now, its structure is similar to the newer case with the normative shifts from the third to the first person, in addition to the contrast between the direct unsubstantiated claims made by the plaintiff and those substantiated, through a number of witnesses, by the defendants. In this micro-narrative, the burden of proof lies, as in the more recent case, on the defendants who had to furnish witnesses, request a *ḥujja* ("record") from a Beirut qāḍī, then use that same record, fourteen years later, as further evidence. In all this, the plaintiffs only created a case for the defendants, while leaving behind all their claims without any evidence.

Once more we're back to the 1850 case. Having satisfactorily proved that the first two disputed properties (#1, 2 in Tables 8-2 & 8-3) were purchased, at a prior date, from their now deceased sister, the defendants now proceed with the remaining three properties (#3, 4, 5 in Tables 8-2 & 8-3):

> [The defendants] claimed that the *dār* and the two *ḥānūt*s, both located at the rear of the house, are not part of the inheritance [of Amīn Mīqātī] but are part of a waqf left by our grand-grandfather 'Izz al-Dīn, from a period of over four-

> hundred years, for his children and descendants, with the males having twice as the females, and the descendants [*dhurriyyat-uhu*] now consist of the two of us, and the children of our cousin, the deceased Shaykh Muḥammad Mīqātī ... And the plaintiffs are not among [our grandfather's] children but from the "outside" [*awlād al-ajānib*]. They therefore should have no rights whatsoever to the house and two shops because such rights belong to us and to the children of our cousin, the deceased Shaykh Muḥammad, and this should be as clear as the sun [*ashhar mina al-shams*]. At this point, the qāḍī asked the plaintiffs [to clarify their position] on the contents of the aforementioned *ḥujja* and the waqf, and they replied by rejecting the [1836] document and denying also that the house and two shops were ever part of a waqf. Considering what the situation had amounted to, the qāḍī requested from the defendants to furnish evidence that would support what was written in the record. They left the court and came back [with the following four witnesses] ... who all certified that the contents of the document are perfectly authentic. Since both the record itself [*ḥujja*] and its ruling are legal, the qāḍī, relying on the latter, issued his own ḥukm declaring that the plaintiffs had no legal rights in the alleged share of their inheritor [Zaynab], that is, the *bustān* and the *dukkān* in Sūq al-Fashkha, because they had been legally purchased [by the defendants] ... The qāḍī then requested from the defendants to furnish evidence [*bayyina*] for their claims regarding their [grandfather's] waqf. They left and brought back with them [the following seven witnesses], each one having individually witnessed that [properties #3, 4, 5 in Table 8-3] were part of the old Banū Mīqātī waqf.

As in previous acts of witnessing, the qāḍī validated the testimonies of the seven witnesses and then issued another ruling, making the old Mīqātī waqf legal. Two things are of interest here. First, that a written record signed and sealed by a Beirut qāḍī and validating a contract of sale, was insufficient evidence per se and had to be "superseded" by the testimonies of four witnesses. (Notice that until now, and throughout the case, the plaintiffs kept furnishing claims and allegations without evidence, which pushed all burden towards the defendants.) But, if witnessing reigned supreme, wasn't it because of the high costs in maintaining property rights and all the required documentation? And wouldn't the cost be reduced in granting possessory rights (*waḍ' yad, taṣarruf,* usufruct) over property rights (*milk*), and in the use of witnesses, rather than documents, in validating such rights? Considering that the selling of land was more difficult because of kinship, scarce availability of surplus and cash, maintenance of registers, and because of property laws that favored possession (or occupation) over ownership, not to mention the massive state ownership of public lands (*mīrī*), the preoccupation moved towards the occupation and use of a land rather than its ownership; hence the permanent need for witnesses (rather than documents) in this fluid process of claims and counter-claims of possession.

The other crucial issue is the declaration made by the defendants—in a self-confident tone—that the plaintiffs, should be considered, vis-à-vis the Mīqātīs, as *awlād al-ajānib* (literally, the "children of foreigners," or more accurately, "children of outsiders"), which brings us back to the critical issue of the "outside" versus the "inside." The defendants *spoke* in a tone that made the whole issue seem obvious—"clear as the sun"—while in fact it could not have been that clear-cut because, as we shall see in a moment, the judge's final statements were entirely devoted to this issue, as they were narrated in conjunction with a "consultation" addressed to the Beirut muftī. Thus, once we assume as we did elsewhere, that the uttered statements do conform to what was written, then the defendants' aim was to make a complex and unsettled issue "obvious" by giving the false impression that it was quite common to assume that the heirs of a woman who got married from "outside" her own family should have no legal rights in a family waqf. Since kinship structures much of what is related to property transfer and distribution of waqf revenues, notions like the "inside" and "outside" of a clan, family, or group; the "us" and the "them"; or, in more anthropological terms, the "endogamic" and "exogamic," were all common currency as far as property rights goes.

> A question was raised to the head of the *'ulamā',* the muftī of the city of Beirut, Shaykh Muḥyī-l-Dīn Yāfī, concerning a group of people [*jamā'a*] who complained against Zayd and 'Umar, and their maternal uncles as well—that you are "controlling" such-and-such properties that were left as an inheritance by your father, also the father of our mother, without any legal cover [*bilā masūgh shar'ī*]. We therefore request from you the properties that we should have inherited from our mother. [The defendants] replied that those properties are part of the old waqf of our great-grandfather, which he had bequeathed for his children, the males and females, and you are not [considered among] his children even though your mother was because your father is an "outsider" [*abūkum ajnabī*] vis-à-vis the founder. The defendants then proved that the above properties are included in their grandfather's waqf. Should we then accept this testimony [*shahāda*] and issue a ruling accordingly, without having the children of the daughter as part of the waqf's beneficiaries? [The muftī] responded by saying that the testimony should be accepted and draft a ruling on this basis. Based on this testimony, the children of the daughter should not be included in the waqf, without legally proving their "inclusion" [*dukhūlihim*], because when one has erected a waqf for his children and the children of his children and their descendants, he does not include the children of their daughters [*awlād al-bint*], because the latter are referred to their fathers rather than to their mothers [*mansūbūn ila ābā'uhum duna ummahātuhum*]. This seems Shaybānī's opinion [*ẓāhir al-riwāya*], and this is the truth, and on this basis this fatwā was issued. ...

What did a fatwā do? How did it work, and what did it attempt to achieve? Fatwās that were summoned on an individual basis, or collected in fatāwā

manuals, did not have the same performative effect as those integrated within court cases. Each one played a distinct role precisely because of the performative role of language and its illocutionary effects. Thus, the above fatwā's purpose was simply to underscore that the children of a benefactor's daughter did not share any of the waqf's benefits; and the reason being that the children were always associated to their patrilineal descent—an assertion that was long made by the defendants. In effect, the fatwā added no legal argument to the claim—since no explanation was provided—but by linking it to Shaybānī it received an aura of legitimacy. Hence the fatwā became doubly effective over the judge's opinion since it received its mantle from both the Beirut's muftī and imām Shaybānī.

Compared to our previous and much longer fatwā that involved a ruling over an *ex parte* hearing (C 7-2), even though both were limited to a single issue only, the present one was far simpler in its composition in that it finds ground in Shaybānī's opinion exclusively. Both point to the fact that in fatwās the juristic typology of the late Ḥanafīs ought to be followed. The judge could have, through his own *ijtihād,* come to the same opinion, but either he was no mujtahid, or else he preferred to back up his own ruling with that of the muftī. Within the textuality of court documents, fatwās got nested with other opinions, situated within a typology of scholars and lawyers, and also of the judge's own text. Fatwās were thus less informative than any ruling since their function was primarily authoritative—to push the ruling in a particular direction rather than investigate—and since their language was recapitulative and generic, they tended to be the only segment within the broader narrative of the "case" to provide a quasi-rationale to the ruling. Fatwās recapitulated a case generically—assuming they specifically targeted a concrete situation—by a process of abstraction and systematization which assumed that all evidence had been validated. Hence the fatwā was a *pièce à thèse* since it pulled together all the strings of the case and its various parts by lashing on the single pièce de résistance that was obstructing the progress of the ruling, which, to be sure, might have been very marginal, such as the legality of an *ex parte* hearing, or the status of the children of a woman's beneficiary whose husband was from another family.

Status and authority of the text

A pattern is beginning to emerge from all the cases examined thus far.

(1) The adjudicative process is normally structured on authoritative opinions that are seldom rendered explicit, and which are connected to the school's core doctrines. In that context, the juristic typology of the late Ḥanafīs helps in

the association between cases and texts. Opinions are thus associated to one another, on the one hand, and to cases, on the other, thanks to their relative "status" and "rank" within that typology. It was not so much the "historical context" that mattered the most in the association between cases and texts, but rather those "gaps" they might have filled in a fatwā or ruling, and how they might have "worked" within the association of opinions (see, for example, the fatwā in C 7-2 *supra*).

(2) Quite often opinions were to be associated with one of the numerous procedural fictions (see Table 2-2 *supra*). Again, here, as in (1), texts were chosen irrespectively of any "historical context," but only in what they might have brought to the logic of the fiction in question.

(3) Fatwās were obviously no exception to the above rules, and their oracular and quasi-rational nature provided the judge with a comfortable way to go ahead with his ruling. One could even say that had judges drafted all their rulings more explicitly by pointing to their step-by-step logic, they would probably have looked like fatwās rather than anything else.

(4) All kinds of "legal" texts had to meet the expectations of specific "audiences," and hence, besides their claim for "truth," they had to conform to the social norms of a particular milieu and locality, which only a linguistic analysis that bypasses truth-claims on a true/false basis would point to.

Thus, if a muftī or judge would pull out an opinion that was several centuries old, and then associated it within the context of the case at hand, the concern would be over the "applicability" of old opinions within a specific social milieu, quite different from the older ones.

Table 8-1
Waqf of Salīm Ḥammūd (Sidon) (C 8-1)

#	Property	North	South	East	West
1	Three-quarters of the "garden" (*bustān*) known as the Muʿayṣīṣa, and *ḥākūrat* (land)[56] ʿAntar, located in *Suqī* Sidon,[57] composed of lemon trees and vineyards, etc.; in addition to two houses with wooden ceilings; and a *qubba* (dome) where rests the body of [the grandmother of the plaintiff] Nafīsa; a pond [*birka*] whose one-fourth belongs to the Shaykh ʿAbdallah al-Salḥ, which draws its water from the canal of Khāskiyyeh which has five counters [*ʿaddādīn*] situated under the mill.	Public road and land of ʿAnbūsiyya.	Road and door; garden of Ḍuhayrī and land of ʿAlī Fakhr al-Dīn.	Public road; garden of Nāṣir and garden of Ḥāyim the Jew and Ibn al-Kalbān.	Road and garden of al-ʿĀmūd.
2	Land of al-Qabbāniyya, located in Saqī Sidon and containing various plantations, and a house and an Iwān, both with a roof [*masqūf*], watered from the canal of Khāskiyya with two counters and a half from the makar[58] of al-Jadīd and that of al-Dibs.	Garden of Shaykh ʿAmār, property of ʿAbdul-Bāqī and his co-partners.	Garden of Muḥammad Ḥashīsha.	Land of al-Najdī, property of ʿAbdul-Bāqī, the Shaykh of al-Ḥaramayn.	Road and the gate with the garden of ʿAyn Abī al-Luṭf.
3	Garden located in the "Land of Lands" (*arḍ al-ḥawākīr*) in Sidon, mulberry and fig composed of trees, a house, a well, a noria (*nāʿūra*), and a pond of water fed on a well.	Land of al-Najāṣa and garden of al-Qaṣr.	Road, garden of Shams, and land of Ḍāhir.	Road, cemetery of the "foreigners" (*al-ifranj*), and lands of al-Naṣb.	Garden of the heirs of ʿUbayd Ḥumṣ.
4	The land of al-Abyaḍ composed of trees of mulberry and fig.	Road and garden of al-Jarāyḥī.	Cemetery of the "foreigners."	Land of Dīb al-Shurayfī.	Road with the door, garden of al-Nāʿūra.

Table 8-1: 1/2

56. In colloquial Arabic (the *ʿāmmiya*), the *ḥākūra* (pl. *ḥawākīr*) denotes a land, close to homes, that is used (*tuḥkar*) to plant trees. In the above list of properties, I shall refer to *ḥākūra* as "land" exclusively, while "garden" refers to *bustān*.

57. Most probably refers to an area in Sidon with readily available cultivatable and watered land. *Suqī* from *saqa* refers to a process of watering the land.

58. *Makara* means to water, so the *makar* could be an instrument of watering land.

#	Property	North	South	East	West
5	Land close to the cemetery of the "foreigners" composed of mulberry and fig trees.	Land of Dīb.	Garden of Shams.	Land of Abū Shmāra.	Road with the gate, and garden of al-Nā'ūra.
6	Land of Zaḥzalānī located in arḍ al-Ḥawākīr in Sidon, containing fig plantations.	Waqf of Bayt Quṭaysh.	Road and land of Bayt ("House") Jamāl, and the land of Bayt al-Saqqā.	Road and garden of al-Sāfūt, property of Ibrāhīm Efendi al-Khaṭīb.	Land of al-Sharshūḥ.
7	Land of Kuzbur containing plantations of mulberry and fig and aloe.	Land of al-Shaykha.	Road and land Banī al-Saqqā.	Land of al-Sharshūḥ.	Road and land of al-Maghāra.
8	Land of al-Maghāra containing mulberry and fig plantations.	Road, and land of Banī al-Salqā, and land of Kuzbur (waqf).	Land of al-Ṣāḥib.	Land of Bayt Jamāl and Bayt al-Dāljī.	Road and land of Kharbūr, and other lands close to the cemetery of the Shī'īs (*turbat al-matāwila*).
9	Land of Nuzha containing mulberry trees.	River of al-Barghūt (active in winter); garden of al-Bayāḍ with the olives of Bayt Kharnūba.	Land of Rayyeh (waqf of 'Ubaydī Bāshā).	Land of Bayt Marmūsh.	Lands for the cultivation of grains/cereals (*bayādir*).
10	Non-cultivated land (*salīkh*) known as Sawād al-Sulkh located in the plain of the city of Sidon.	Sawād Ismā'īl Marmūsh.	Land of Ḥasan Dīb.	Road.	Sawād Bayt Marmūsh.
11	Half of the salīkh land known as Dawwārat Khalīl al-Zurayrānī, located close to the garden of the well of Qabuā, and shared with the other half with the Shaykh Ibrāhīm Efendi al-Khaṭīb.	Land of Bayt Jawhar.	Land of Banī Quṭaysh (waqf).	Land of Bayt al-Quṭb.	Lemon land.
12	Half of the coffee-shop located in Sūq al-'Aṭṭārīn in Sidon, sharing with the other half with the heirs of the Shaykh Muḥammad Ṭanṭash.	Shop of Bayt Quṭb.	Shop (*dukkān*) of Qāsim al-Nāyib.	Road.	Property of Bayt al-Quṭb, with a private road.
13	Shop in Sūq al-'Aṭṭārīn.	Shop of Muḥammad Sa'īd al-Muftī and Ṣāliḥ al-Yammānī.	Property of Bayt al-Quṭb.	Anbār al-Sha'īr.	Road and its gate.

Table 8-1: 2/2

Table 8-2
Inheritance of Amīn al-Mīqātī (Beirut) (C 8-2)

#	Property	North	South	East	West
1	Garden (*bustān*) of Bayt al-Mīqātī located in Mazraʿat al-Qinṭārī, outside Beirut, containing mulberry plantations of mulberry and a tower (*burj*).	Garden of al-Bassūṭ.	Garden of Sarbiye.	Garden of Ḥamādeh.	Garden of al-Manāṣfī.
2	Ten and a half qīrāṭs of the shop (*ḥānūt*) located in Sūq al-Fashkha in Beirut, facing the street (*zārūb*) of Shaykh al-Islām where lives Yūsuf al-Nuwayrī.	Road with the gate (*al-ighlāq*).	Olive mill (*maʿṣarat*) of Banū al-Saylīnī.	Shop (*ḥānūt*) property of the heirs of Ḥajj Muṣtafa Badr.	Shop part of the waqf of al-Qaṣṣār, home of ʿAbdul-Qādir Ṣulṭānī.
3	House (*dār*) located in Sūq al-ʿAṭṭārīn ("Market of the Perfumers") in Beirut, in the street (*zārūb*) of Banū ʿIzz al-Dīn.	House part of the waqf of Banū ʿIzz al-Dīn.	Qīsāriyya of Shaykh Shāhīn Talḥūq.	Sūq al-ʿAṭṭārīn.	Home of Qūsh.
4	Shop located in Sūq al-ʿAṭṭārīn at the bottom of the same neighborhood (*ḥāra*) as above (#3) where lives Amīn Aghā Ramaḍān.	Shop (*dukkān*) whose first half is the property of Ḥājj Ṭālib Shayqalū, and the second half is the waqf of the khibz (bread).	Shop (*dukkān*) part of the waqf of the Mosque of Sidon.	Road with the gate.	House identified in #3.
5	Shop located in the same Sūq as above (#3, 4) where lives the Jewish plumber (*al-yahūdī al-sankarī*).	Shop (*ḥanūt*) part of the waqf of Banū ʿIzz al-Dīn.	Shop of the waqf of Zāwiyat Sūq al-Quṭn ("Cotton Market").	Road with the gate.	House identified in #3.

Table 8-3
Shares of Zaynab al-Mīqātī according to the various parties in the two cases (in qīrāṭs) (C 8-2)

#	Property	Husband's Claim (1836)	Plaintiffs' Claim (1850)	Defendants' Claim (1850)	Final Decision (1850)
1	Garden (*bustān*) of Bayt al-Mīqātī located in Mazraʿat al-Qinṭārī, outside Beirut, containing mulberry plantations and a tower (*burj*).	1 + 1/4+ 1/2(1/8)	2 + 5/8	1 + 2/8+ 1/2(1/8); purchased from their sister prior to 1836. Other half property of their three cousins.	Property of the defendants according to a Ḥujja in 1836.
2	Ten qīrāṭs and a half of the shop (*ḥānūt*) located in Sūq al-Fashkha in Beirut, facing the street (*zārūb*) of Shaykh al-Islām where lives Yūsuf al-Nuwayrī.	1 + 1/8 + 1/8(1/8) + 1/2 [1/8(1/8)]	1 + 1/8+ 1/8(1/8) + 1/2 [1/8(1/8)]	1 + 1/8+ 1/8(1/8)+ 1/2 [1/8(1/8)]; purchased from their sister prior to 1836.	Property of the defendants according to a Ḥujja in 1836.
3	House (*dār*) located in Sūq al-ʿAṭṭārīn ("Market of the Perfumers") in Beirut, in the street (*zārūb*) of Banū ʿIzz al-Dīn.	No claim.	2 + 5/8	Grandfather's waqf.	Waqf of ʿIzz al-Dīn al-Mīqātī of which the plaintiffs should have no claims.
4	Shop located in Sūq al-ʿAṭṭārīn at the bottom of the same neighborhood (*ḥāra*) as above (#3) where lives Amīn Aghā Ramaḍān.	No claim.	2 + 5/8	Grandfather's waqf.	Waqf of ʿIzz al-Dīn al-Mīqātī of which the plaintiffs should have no claims.
5	Shop located in the same Sūq as above (#3, 4) where lives the Jewish plumber (*al-yahūdī al-sankarī*).	No claim.	2 + 5/8	Grandfather's waqf.	Waqf of ʿIzz al-Dīn al-Mīqātī of which the plaintiffs should have no claims.

Chapter 9
Judicial policy making and the politics of the regional councils

In one of its routine sessions, on Tuesday, December 18, 1844, the newly established majlis of Damascus was pondering over the case of the Emirs Ḥarfūshs, a notable Shīʿī family from the region of Baʿalbak[1] who were responsible of the iltizām in that same area **[C 9-1]**. The Emirs, as it turned out, had not paid their mīrī dues for the last two years. That in itself should not have created that much of a problem with the local authorities because many of the majlis' sessions, since the beginning of that year, were devoted to issues related to the iltizām and mīrī collection. Basically, the peasants of a locality would petition the majlis concerning the heavy load of mīrī they had to pay (a petition often drafted in Turkish and first addressed to the *defterdār,* the official whose authority was next to the governor), in cash and/or in kind, to their local multazim (who could have been working in association with a more powerful urban multazim, often a member of the majlis itself); they would then explain, say, how the heavy rain that winter destroyed their crops, or how their multazim was abusing them by requesting too much; they might even urge the majlis to reconsider the payment plan imposed upon them in terms of more carefully spaced installments. To be sure, those were only but a few of the requests that typically came in petitions, collectively signed by the *ahālī,* to the majlis; and the majlis was pretty flexible when it came to such matters as curbing the authority of an abusive multazim, lowering the mīrī dues to a certain extent for the year in question, or increasing the yearly installments.

The Ḥarfūshs, however, not only were very late in submitting their dues, but, more important in the eyes of the majlis, they neither petitioned the members of the majlis for anything (in writing, of course)—nor have they attempted to explain to the latter their situation, nor have they proposed

1. Currently located in northeast Lebanon.

procedures for a better levying of the mīrī. Needless to say, the majlis saw such attitude as one of pure contempt and provocation, and, already in its session that day, it manifested signs of impatience and irritation. To begin with, the Ḥarfūshs were accused of illegally imposing dues upon their own people, and keeping them for themselves instead of submitting them to the treasury; thus, even though they were the officially appointed multazims (or at least some of them were), the majlis accused them of oppressing their own peasants; and then, surprisingly, in what seems like a gesture of desperation, the majlis identified the status of the Ḥarfūshs with that of the Shī'īs in general by qualifying them as "the confession of refusal [*al-milla ar-rāfiḍa*]." Even though such a qualification was common to the Shī'īs throughout the Ottoman period, its inclusion within the drafted minutes of the majlis was an event all by itself. Right at the beginning of the reforms period, an era that began with a public declaration in favor of an equal status for "minorities," a confessional group was, in a derogatory tone, accused *as a totality* for misappropriating and mismanaging the resources of the state.

To be sure, the problems specific to the Ḥarfūshs—not to mention other Muslim or non-Muslim "minority" groups—were as old as the Ottoman conquest to Bilād al-Shām. On September 28, 1590, the Damascus wālī arrested 'Alī Ḥarfūsh, the Emir of Ba'albak, and kept him imprisoned in the citadel until November 10, 1590, when he was executed, thus fulfilling a sultanic firman to proceed with the execution. In fact, Ḥarfūsh's death was so crucial to the sultan and his entourage that his head was sent to Istanbul and buried over there.[2] Even though the motives behind the execution remain uncertain, it is nevertheless assumed that the Ottomans were in the process of testing their balance-of-power policy, thus establishing in the Biqā' valley, as a counter-balance to the Ḥarfūshs, the chieftaincy of Manṣūr b. Furaykh, who was also the Emir of the annual pilgrims' caravan. But apparently that was not a strong enough a measure, and the head of the Ḥarfūshes lost his head—literally—to create a more stable equilibrium in the region.[3]

The first freshly designed Tanẓīmāt majlis of Damascus assumed its functions right after the Egyptian withdrawal in 1840. Due to the scarcity of the documentation regarding such institutions, it is not clear 1) how the majlis of the Tanẓīmāt differed, if at all, from the *dīwān* of the previous periods headed by the wālī; 2) whether those majālis differed in any way from those instituted by the Egyptians in their eight-year domination of Bilād al-Shām; and 3) on what basis were the twelve members of the majlis selected, how long

2. Sharaf ad-Dīn Mūsa b. Yūsuf al-Anṣārī, *Nuzhat al-khāṭir wa-bahjat al-nāẓir*, 2 vols. (Damascus: Wizārat al-Thaqāfa, 1991), 1:168-69.

3. Anṣārī, *Nuzhat,* editor's introduction, 1:18-19.

they served, and what were their exact functions; finally, 4) in what way did the role and function of this particular majlis, known as *majlis shūra al-Shām al-ʻālī,* differ from subsequent majālis created at later periods, in particular when the legal system was subjected to intense reforms with the promulgation of new quasi-western codes.

What is of interest to us, however, is the judicial function of the majlis. In fact, the first majālis of the Tanẓīmāt, headed by a select group of *aʻyān,* enjoyed broad powers to handle legal cases and adjudicate. In other words, the notables acted as legal honoratiores. Later majālis, of the second Tanẓīmāt era, albeit more specialized, had similar powers to adjudicate. Again, the status of current research does not allow for any comparison between the adjudication of the Tanẓīmāt majālis and any other form of adjudication that might have existed within institutions outside the sharīʻa courts. The main set of questions, therefore, that need to be addressed at this juncture are the following: How is it that a body of non-professionals—mainly selected on the basis of their social standing—were granted so broad a range of legal powers? In other words, and considering that adjudication was mostly limited to within the walls of the sharīʻa courts, why was an extra source of adjudication needed? Why couldn't the sharīʻa courts handle cases that became part of the majlis jurisdiction? What was behind such a division of power between various jurisdictions?

The point in this chapter is to argue that, by acting as legal honoratiores, the notables that headed the various regional councils of the first reform era framed their adjudicative decisions within a political framework that was a combination of policies sustained by the imperial bureaucracy, on the one hand, and dictated by their own regional interests, on the other. It was thus this combination of central and regional interests that led to what I will refer to as the *judicial-policy making* of the regional councils, a function which with the second reforms will be routinized so that adjudication will appear more court-like, in particular with the institutionalization of the niẓāmī courts in the 1870s. In effect, the main difference between all the procedures of the sharīʻa courts, which we have examined thus far, and the minutes of the regional council of Damascus, to be discussed in this Chapter, is that the courts were well entrenched into their communities so that their procedures were well routinized and predictable in such a way that it would be meaningless to speak of any policy-making process, but only of a judicial decision-making. The distinction is important as it is at the core of all the adjudication that took place around state-owned mīrī lands, whose jurisdiction was limited to the regional councils. For that very reason, and the fact that Ḥanafī practice remained a "community law" and was endorsed by the state as such, the *shurūḥ* manuals that we have examined in Chapter 4 kept an archaic language regarding Ottoman land tenure and did not venture much into the logic of the

iltizām-mīrī system. Thus, with the "silence" that the Ḥanafīs kept regarding that system, on the one hand, and the fragmented sultanic ordinances, on the other,[4] the regional councils created a politically active adjudication, and, to be sure, one that was much more aggressive than that of the sharī'a courts.

In fact, compared to the sharī'a courts, the majlis cases were overall less routinized, "harder," and hence more unpredictable both in terms of the subject matter and outcome. For one thing, they certainly did not fit within the ready-made formulas that characterized the sharī'a courts; and their outcomes—the final rulings—had always an element of unpredictability. What was also striking about the majlis cases was how little they relied upon any form of legal opinion or codes, be it jurists' manuals, qānūnnāme, or any other source of law. Only in a couple of occasions was a penal qānūnnāme mentioned, but with no other specification, for example, as to the year of promulgation, the locality, or any other detail that might have helped in the process of identification. The majlis cases thus appear freed from the heavy burden of the historicity of the opinions produced by the Ḥanafī fiqh. So what was the legal basis for the *a'yān*'s rulings?

The question becomes even more pressing as soon as the nature of cases is examined. Some of them turn out not much different from the ones of the sharī'a courts, and a careful analysis is needed to determine why they ended up within the majlis' jurisdiction. More specifically, on land issues, the sharī'a courts kept within their jurisdiction all property sales and tenancy contracts, the division of revenues among the beneficiaries of a waqf, and the like, while they managed in creating legal devices for transferring properties and even changing their status. The majlis was left with the more "public" issues, in particular problems relating to the payment of the *māl mīrī* to the treasury. Indeed, the great majority of all cases dealt with iltizām issues and problems related to the collection of the mīrī that the more traditional sharī'a courts could not possibly have handled on their own: but why exactly? Why were the sharī'a courts—those courts that precisely handled all kinds of cases from marriage and divorce, to crime and land—in need of being supplemented by another source of adjudication?

But despite the rarity of research regarding regional councils in general, a fundamental truth can be ascertained: their primary function was indeed more legal than political; moreover, to perceive them only in a political function of some sort, say, because of the *a'yān* presence on their boards, is erroneous and leads to gross mistakes in the reading of their texts. In fact, it was the existence of a parallel body of legislation to Ḥanafī practice that primarily led to the

4. See Chapter 10 *infra*.

creation of the regional *dīwān*s and councils. Considering that it was difficult, if not impossible, to integrate two different sources of legislation into a single adjudicative body—namely, into the space of the sharī'a courts—the other alternative was to create a parallel adjudicative body specifically designed for that kind of legislation. Two possibilities were thus open: 1) either give birth to a body of specialists in sultanic legislation; or 2) hand over the function of adjudication to the various *a'yān* of the cities. The first possibility would have created a body of specialists without much legitimacy, while the second alternative was more realistic. To be sure, the Ottoman central bureaucracy, in giving so much power to the urban *a'yān,* was aware of the risks behind such a delicate operation, and the misuses of power that it could engender. Needless to say, some of the Damascus *a'yān* abused their powers, and saw the majlis experience as a way to intimidate their political opponents—the Ḥarfūsh case definitely extends beyond the purely "legal" into abusive political relationships. However, many of the majālis cases consisted of purely routine tasks and usually met the normal legal expectations, while others could be classified as "hard" cases that were in need of an elaborate scheme of adjudication on a case-by-case basis; and it was mainly within this last category that the borderline between the political and legal as such began to blur.

While juxtaposing the various textual "legal" levels—Ḥanafī practice, sharī'a courts, sultanic legislation, and the regional councils—and associating them with one another, a reality emerged: even though all those discursive practices were intended to contribute to the "legal" sphere—defined broadly as a level that produces itself by means of (or contributes to) an adjudicative process—they were nevertheless characterized by their incongruence. In other words, the whole system fell short into constructing a more abstract set of codes and norms that would have brought a sense of coherence into the heterogeneous textualities we come across: the Ḥanafī manuals, for example, avoided any reference to the complexities of the Ottoman land tenure system as such, and clustered instead on the obsolete medieval notions of the *'ushr* and *kharāj*. That left the sharī'a courts with either gaps or half-answers to pressing land litigations, and were therefore limited, *mutatis mutandis,* to their own legal devices to solve such litigations; that in itself, however, proved at times inefficient since the majlis had in turn to pick up on cases that the courts could not handle, basically because no clear legal texts were drafted for that purpose. In the meantime, and in order to fill the gaps and silences that Ḥanafism inevitably left behind, sultanic legislation had to impose its own set of laws, firmans and orders. Finally, some of the most common customary practices had to be accepted on an ad hoc basis and integrated as such within the broader framework of canon law. Because discourses are always embedded into power-relations which they express in one way or another,

the textual incongruence was an indication of the various social and political powers that were left autonomous on their own without ever subjecting them to the monopolizing power of the state. Thus, jurists kept a similar tradition to the one their ancestors were already accustomed to in the previous Islamic empires: that of a ferociously critical position, albeit in a veiled language, that established itself as a result of the poor control of the state apparatus over its territories. As to the administration of notables of the main cities, it never established anything near a "policy," a community, or a public sphere: what mattered most were alliances between individuals and groups located within networks; and those in turn led to the autonomous sources of jurisdiction of the *a'yān* and their majālis.

It was therefore ironic that those who controlled the iltizām networks should be adjudicating over iltizām and mīrī petitions and litigations. Thus, the set of documents related to the Ḥarfūshes should be read in terms of the power relations within the political and economic networks of the notables, since then dominated by the majlis. In fact, the Damascus notables followed their own rules when it came to city itself. Thus, the majlis of 1844-45 (the one that handled the Ḥarfūsh case) had managed to evict from its own ranks the two notables representing the Jews and Christians of the city so that by 1844 the majlis was composed of twelve Sunnī members only. Between 1840 and 1860, the economic status of both the Jewish and Christians communities had already considerably weakened (the Christians seem to have had their best time during the reign of Muḥammad 'Alī of Egypt): the activities of the majlis, and the way it imposed taxes (such as the *i'āne*) with unfair and higher proportions on minority groups, in addition to its members monopolizing the iltizām auctions, were among the factors that precipitated the decline of the economic activities of both Christians and Jews that were prosperous only a couple of decades earlier. Thus, by the time of the 1860 massacres, which, in Damascus alone ended with a heavy toll of close to 5,000 Christians, the business of many Christian families and individuals had already weakened significantly relative to earlier pre-Tanẓīmāt periods; and what the massacres added was a massive destruction of accumulated wealth and symbols of prestige (such as homes, churches, and manufactures). In other words, one should not look at the causes of the 1860 massacres in terms of a desire to weaken the Christians—since those had already seen their commerce tremendously weakened—but more as a symbolic victory of the Sunnī notables (in Mount Lebanon it was a different story altogether).[5]

5. In many ways, like the *prise de la Bastille:* an unnecessary event, considering that the Bastille was already empty and lost its political significance; but, on the other hand, a necessary symbolic event that came to epitomize the new spirit of the French Revolution.

The Ḥarfūshes could have therefore represented an altogether different path from what the majlis had been accustomed to. First, even though the Ḥarfūshs were under the jurisdiction of the Damascus majlis, they were located in Baʿalbak, a region far enough from Damascus and with a different structure of power-relations; second, the Ḥarfūshes were more like an extension to the nobility of Mount Lebanon with its strong confessional divisions between Druze and Maronites, and occupied a peripheral space where the notables were proximal with their peasants, on the one hand, with a feeling of independence both from the Ottoman wālī and the nobility-at-large, on the other (at that time, Mount Lebanon was under the jurisdiction of the wālī of Sidon); third, even though the Ḥarfūshes were Muslims, as Shīʿīs they nevertheless were just another *millet,* in the same way that, say, Christians and Jews were not part of "us." The majlis will keep that in mind.

The majlis addressed the Ḥarfūshes through their representative, Emir Muḥammad Ḥarfūsh, who was appointed by the majlis as *muḥaṣṣil* (a tax collector of higher status to the *multazim*) to the region. He was obviously present at the majlis that Tuesday, December 18, 1844. In what seems to have been a follow up to previous sessions devoted to the Ḥarfūshes but not included in the present volume,[6] the majlis looked as if in the middle of an already heated up debate. Regarding the sanjāq (province) of Baʿalbak, whose revenues (*muḥaṣṣaliyyah*)[7] Emir Muḥammad was responsible for collecting on behalf of the treasury, not much of the mīrī had been collected.[8] The majlis claimed that the Emir had promised them "to go to the aforementioned sanjāq and arrest all those who seized [*istawla*] the *amwāl amīriyya,* in order to extract from them all the dues from the villages." That, apparently, did not happen, and "All what resulted from their behavior was oppression [*ṭighyān*] and misbehavior [*khurūj ʿan al-ṭāʿa*] because they seized the *māl mīrī* of most of the villages. The villages should therefore be held responsible [*yuḥāsab*] for the receipts [*ruju'*][9] in their hands, so that the villages which had still not paid all their mīrī dues would have them legally collected [*bi-l-wajh al-ḥaqqānī*] without any usurpation over anyone of the *raʿāyā*... Anyone who shows

6. It is unclear why only a single volume has survived from all the minutes of the majālis that succeeded one another throughout the Tanẓīmāt.

7. More correctly: *maḥṣūl.*

8. Majlis Wilāyet Dimashq, 67/98/7 Dhul-Ḥijja 1260 (December 18, 1844). Page and document numbers have been added to the original, and even though the new numbering of documents does not make much sense (a petition and its reply are numbered with different subsequent numbers), I kept them to facilitate document search.

9. This seems to have been a common local word, probably meaning "claims" or "demands" (from the verb *rajaʿa,* to return, come back).

inappropriate behavior will be arrested and sent to the *dīwān al-mushīrānī...*"[10] The text then summoned the preparation of detailed lists of all the villages with their modes of payments (full, partial, or no payment at all) in order to submit them to the *defterdār.*

The document therefore claimed that the *māl mīrī* was collected and seized by force by a non-identified group that oppressed and mistreated the villagers. The textual vagueness is more than surprising since the appointed Emir was officially requested to arrest individuals that the majlis did not even bother to identify by name. Could it be that the majlis was expecting some form of reconciliation and therefore avoided denouncing local powers as a form of courtesy? Or did it simply avoid pointing by name to what was already obvious? As was common in such cases, "the *ra'āyā* and peasants" were made innocents and given a certificate of good behavior (*ḥusn sulūk*), while an unnamed group of individuals was demonized for having collected the mīrī illegally. So the implication here is that since only a small minority was illegally oppressing the villagers and their peasants, it was the local authorities' duty to free the *ra'āyā* from such an oppression. The division between oppressors and oppressed was useful to the majlis in that it gave a potential for military or political intervention; but, besides not naming directly the group of alleged oppressors (obviously, as we will learn from the following document, they will turn out to be the Ḥarfūshes themselves—but who else could be accused of such a hideous crime?), the document leaves open the issue regarding the reasons behind such an "oppression": Why did such a massive oppression, involving a large number of villages, take place? What was the aim of the alleged oppressors and why did no one from the villages' *ra'āyā* submit a petition on behalf of the rest of the villagers? In other words, the majlis chose to avoid the whole issue of the "autonomy" of the rural nobility as exemplified by the *muqāṭa'jī*s of Mount Lebanon, and that the reasons behind such upheavals—whether gradual or sudden—was a desire to collect and re-distribute the mīrī on a different basis than it has been hitherto practiced. Such a desire was prompted partly due to changing social conditions, with the peasantry emerging as a real force; and that was even more true in situations where the nobility found itself in proximity to its peasantry.

The following day, on Wednesday, the majlis met briefly to discuss the case again: the official *muḥaṣṣil,* Emir Muḥammad Ḥarfūsh, was beaten up and humiliated by the Ḥarfūshes.[11] But it is unclear whether that took place overnight, after the majlis had encouraged, the previous day, the Emir to

10. The role and function of that dīwān is unclear.

11. Majlis Wilāyet Dimashq, 69/99/8 Dhul-Ḥijja 1260 (December 19, 1844).

proceed forward with his levying of the mīrī, or whether the majlis knew about it but chose to hide the event for strategic reasons (one possibility is that they preferred not to show that they were playing hard from day one). The majlis then took a short break for the Muslim holidays and met a week later to discuss the case at length.

> The condition of the Ḥarfūshs Emirs, *muḥaṣṣil*s of the sanjāq of Baʿalbak, is no secret. They collected the *māl mīrī* but kept it [for themselves]. They committed lots of bad actions [*afʿāl radīʾa*], so that when we have selected from them Emir Muḥammad Ḥarfūsh, and brought him to our side on the condition that he goes on with the acceptable services, including the collecting of the *amwāl amīriyya.* It was then decided, following consultations in the majlis and after an official document was drafted, that he should be sent [to the Baʿalbak region]. So we dressed him up [*albasnā-hu*] and sent him with a military official, Muḥammad Aghā Būẓū [accompanied by 150 cavalrymen]. Once the [Ḥarfūshes] knew about it, and when the [two] reached the Biqāʿ [valley], they gathered with villagers of the Sanjāq and confronted the [two officials] with war and fighting, thus manifesting [a desire for] insurrection and oppression [*ʿuṣyān wa ṭighyān*]...[12]

The document thus far gives the impression that the Emir had been appointed a week before, then went for his mission the following day where he got stuck with his clan and their villagers. In fact, the Ḥarfūsh notables as a group were originally appointed as *muḥaṣṣil*s to the region (a similar function to the *muqāṭaʿjī*s of Mount Lebanon), and only when they refused to proceed with their mīrī payments, was Emīr Muḥammad appointed (*faraza:* set apart, isolated, separate; if the use of *faraza* was deliberate, then this could be an indication of a process that was already violent in and of itself). Moreover, since the peasants had now sided with their masters, the question arises as to who was really oppressed?

> When [the Ḥarfūshes] had expelled one of the defterdār's representatives, Ḥusayn Aghā, who was responsible for collecting the *amwāl amīriyya,* a decision was reached between the majlis and the defterdār in order to work out for a trustful link [*rābiṭa ḥasana*][13] in order to collect the māl mīrī that the aforementioned Emirs had taken [by force]. When [the idea] was put forward [to the majlis], it was decided to select Emir Muḥammad from [the clan] of Banū Ḥarfūsh... He was first living in agreement with [his own clan]... and then dissociated himself [*insalakha*] and his brothers [from the clan], came to Damascus, and was sent to the majlis. He promised there to collect the

12. Majlis Wilāyet Dimashq, 69/99/14 Dhul-Ḥijja 1260 (December 25, 1844). The document should have been numbered separately from the previous one since those were two different events.

13. An awkward expression, probably meaning "appoint the right person for the job."

> māl mīrī that was stolen in order to insure peace for the *ra'iyya* and the rest of the population [*ahl*] and begin construction in the region [*'amār al-bilād*]. [It was also agreed upon] that he should arrest his oppressive cousins, and attempt, as much as possible, to collect the māl mīrī from them and from their followers...
>
> At the majlis, it was noted that [the Ḥarfūshes] were immersed [*maghmūsīn*][14] into the well-being and benefactions [*in'ām wa iḥsānāt*] of the [Ottoman] state because of the regular global monthly salaries [*ma'āshāt kulliyya*][15] [that they received] and because of the sanjāq's revenues that they used to collect... Their subsistence [*arzāq:* income, revenues] was thus enhanced because they were responsible for collecting the mīrī and because, unlike many others, they were exonerated from the payment of the *verghi.*[16] But all that emanates from them are signs of rejection, and they do not even deserve anything from that [well-being], *primo,* because they are known to belong to the confession of refusal [*millat al-rāfiḍa*],[17] and, *secundo,* because all what they practiced was an excess of oppression and a seizure of [public] money; in addition to rejecting [our] ultimatum and beating [their cousin] Emir Muḥammad... What therefore came from them was nothing but the secession of the insurrectionists [*inshiqāq al-'uṣāt*] and the refusal of subordination [*al-khurūj 'an al-iṭā'a*]. Thus, there is a real possibility that such practices might extend to the mountains, sanjāqs, *muqāṭa'āt,* and *nāḥiya*s, such as Jabal al-Kalbayn and Qal'at al-Ḥuṣn,[18] in addition to other places. It is therefore necessary to stop the actions [*rad'*] of such hypocritical confessions [*al-ṭawāyif al-khabītha*] in order to conserve [the integrity of] the *ra'āya* from corruption and keep the *amwāl amīriyya* [into safe hands]. [Official] soldiers should be sent [to the locality in question] ... and arrest [the Ḥarfūsh Emirs]...[19]

Clearly, whenever the majlis was confronted with a "hard case" such as this one, the criteria for adjudication became altogether troubled. If adjudication consists, at its most basic level, whatever the ideological conditions, of an impartial (official) authority imposing itself between two or more disputants,

14. More correctly: *munghamisīn.*

15. *Ma'āshāt,* literally salaries, is closer here to "revenues." Those might have consisted of special tax units that were assigned as *maqṭū'* to the Ḥarfūshes for their services to the state. It was not in the custom of the Ottoman state to give monthly cash "salaries."

16. "Impôt foncier," equivalent to 4/1000 of the value of lands subjected to the *'ushr.*

17. A term commonly attributed to the Shī'īs by the Ottomans. It obviously referred to the Shī'īs' rejection of most caliphal authorities, beginning with the first caliph, Abū Bakr.

18. Original French (Latin) name: Krak des Chevaliers, one of the most impressive castles constructed by the Crusades. Clearly, the majlis' concern was that the locality of al-Ḥuṣn, with a majority of Christians, would eventually follow the same path as the Ḥarfūshes.

19. Majlis Wilāyet Dimashq, 69-70/99/14 Dhul-Ḥijja 1260 (December 25, 1844), a continuation of the previous document.

and then ruling while following the established normative rules of the legal system in question, then the adjudication of the majlis must have lost its way at some point. In fact, what the above passage points to was a weak—if not total absence of—legal reasoning that was supposedly applied. Normative rules gave way to an insulting political language in which individuals that refused to pay their mīrī dues were *ipso facto* identified with their own group, the Shī'īs, or "the confession of refusal," or "the hypocritical confession."

According to the majlis, the Ḥarfūshes were supposed to have had the very opposite kind of behavior from the one they manifested that year. They had special treatment from the Ottoman and local authorities, and were responsible for levying the *māl mīrī*—that by itself was a privilege since it enhanced their social and political status by placing them high in the hierarchy of landowning families (similar in many respects to the ruling *muqāṭa'jī*s families in Mount Lebanon); they were also exempted from many land and property taxes; and, finally, they used to receive lump sums (*maqṭū'*) from special *iqṭā'* assignments. The majlis was therefore asking the most obvious question: Why would a dominating family with so many privileges choose to withhold public funds instead of giving them to the treasury? Because they were Shī'īs, the majlis replied.

Ironically, a great deal of the first Tanẓīmāt era, as stated in the 1839 Gülhāne edict, emphasized the right of "minorities" to have their fair share within the legal, political, and economic system; the edict also stipulated an end to the iltizām and a replacement to all kind of "intermediaries"—such as the Ḥarfūshes—by state appointed employees that would collect taxes as state agents without any of the political or social privileges traditionally allocated to tax-farmers. Needless to say, the majlis had no interest in the politics of reforms, and, for its twelve-member board, it was business as usual—an *administration* of things, people, resources, and money in such a way that it kept the old hierarchies between families, individuals, and groups intact. In fact, a "politics of notables" as such did not exist, but only an administration based on a combination of rural and urban networks. What is striking about this case, is how much the rural notables, whose kin relations were constructed along complex genealogical lineages of *'ashā'ir,* were, in the final analysis, a *terra incognita* in the eyes of the small group of the Damascus *a'yān.* For one thing, the rural notables enjoyed closer links with their peasantry—something that the notables of Damascus were not accustomed to (their relationship to their peasantry was usually through intermediaries: secondary multazims, rural aghās, money lenders, etc.)—and their small wars with one another lacked the subtlety of their urban counterparts. Indeed, like the ruling families of Mount Lebanon, their relationships were bloodier—in particular between brothers and cousins; their marriages were for the most part kept within the

clan, between cousins, while the majority of marriages of the Damascus nobility was maintained among the upper *a'yān* families themselves, thus considerably widening possible choices. To be sure, hierarchy and social status were primal.

The case remained dormant for roughly a month, more precisely, until the first month of the new year, 1261 (1845). The data provided in the minutes of the majlis became more specific: the rebellious persons from the Ḥarfūshes were finally fully identified, and the sums they illegally collected were also specified, and even the nature of the special arrangements between the local authorities and the alleged rebellious persons were revealed. Described as the culprits (*ashqiyā*) of Banū Ḥarfūsh, four Emirs were identified as having sacked 465,000 piasters from the *māl mīrī* of *liwā'* Ba'albak.[20] Allegedly, one of the four, Emir Khanjar, had acknowledged that he and his associates owed the treasury the sum of 200,000 piasters, which he promised to pay within a period of thirty-one days on the sole condition that the control (*ḍabṭiyya*)[21] of the *liwā'* remains for himself and his cousins, thus maintaining the same privilege as to the preceding year (1260). As to the remaining 265,000 piasters, it would be eventually paid, but no time framework had been worked out yet. Emir Khanjar, the text reveals,

> . . . thus presented a memo [*taqrīr:* report] that [the 265,000 piasters] will be kept with his relatives [*ahl*], and that they will be drafting a written document on their behalf and on behalf of the elders of the confessions [*mashāyikh al-ṭawāyif*] of the aforementioned *muqāṭa'a.* Thus, if they were granted control [of the *liwā'*], they will keep their promises [concerning payment of the withheld money], but if someone else is to be granted control [*ḍabṭiyya*], then there will be even more people leaving [*nazaḥa*] their villages than in the previous month.

The text now reveals that those same "culprits" might have been linked to much deeper social movements. Thus, the extorted money from the *māl mīrī* was kept with "relatives"—an indication all by itself of the broadness of a movement also supported by elders, villagers, and peasants. The ambiguous closing, concerning villagers fleeing their homes in fear of a harsh treatment from *muḥaṣṣil*s that might be appointed to replace the Ḥarfūshes, might, in turn, constitute another indication that the latter were not that much of an oppressor; they were rather adjusting their power-relations to the deep discontent of the Ba'albak region peasantry. The episode also shows how much the rural mīrī collectors, whenever belonging to a minority group, enjoyed tremendous bargaining powers vis-à-vis the local authorities and the central state.

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20. Majlis Wilāyet Dimashq, 110-111/149/15 Muḥarram 1261 (January 24, 1845).

21. Seems to have been a colloquial word from the root *ḍabaṭa,* to control, adjust, regulate and check.

> After consultation at the majlis, it was agreed upon that [such arguments presented by the Ḥarfūshes on their behalf] were part of an insurrection [*'uṣyān:* disobedience, insubordination] so that they constructed a deception [*mukhātalah*][22] in order to keep up with the *amwāl amīriyya* and transform the latter into a hostage [*rahīna*] like situation so that they end up getting [their request] to control [the *liwā'*] in 1261. They will then [consolidate their] control [over] the *ra'āyā* and their relatives so that what they will collect in 1261 will serve as a way to refund [their dues] for 1260. Because of this, their promises, being meaningless, should not be accepted since when they were in control in 1260, they promised in writing that they will be levying the mīrī. But the document, since then at the treasury, led to nothing except their sacking the māl mīrī and preparing for [movements of disobedience]...

The text then goes on and recollects the events of the preceding year: how a small army unit was sent to the region, an act that led to the division of the Ḥarfūshes into two groups, one of them, according to the document, led by Emir Kanjar, who had negotiated with the authorities in Damascus in order to exchange the mīrī with a new iltizām contract for the current year. The majlis, however, reiterated its claims concerning such illegal acts: that the withheld money was kept in a hostage-like situation to be released only when certain conditions were met; and that the whole enterprise was aimed at disappointing, or rather, bargaining first and then disappointing. Thus, the majlis made it clear that it could not accept such erroneous behavior anymore, and that there was an urgent need "to manifest the power of (state) rule [*iẓhār shawkat al-ḥukm*]." It therefore decided that their new appointed *muḥaṣṣil,* Emir Muḥammad, should enjoy their full support in order to be capable of fully controlling the rebellious tax units and subject them to state control as soon as possible.

To be sure, urban and rural notables battled on the ground for the distribution of revenues in different ways. Rural notables had better control over their territory, which meant that troops had to be dispatched, in rare cases of insubordination, from the nearest garrisons. By contrast, urban notables controlled the distribution of revenues in more subtle ways: thus, whereas the Ḥarfūshes had to hostage the mīrī in order to ensure that their next-year contract would be renewed, the notables of the majlis ensured their iltizām rights by simply belonging to the majlis. But, in both cases, the outcome was similar: the state had to ensure special privileges—the *iḥsānāt,* as the majlis named them—to its "rent-collectors" in order to guarantee their subordination. That in itself was enough to institute a state apparatus that could not distance itself from the power-relations within society. In other words, the state had

22. Also: *khatl,* deceit, trickery, chicanery and fraud.

to struggle for its own political and economic survival with those same status groups that it appointed as "rent"-farmers and upon which its political legitimacy rested.

The failure in creating objective grounds for the state administration in order to address itself as an impartial arbitrator over "social" conflicts could best be assessed within the multiplicity of judicial jurisdictions and their different grammars and incongruence with one another. In spite of the fact that sharī'a court judges were state appointees, rulings depended more on the discursive nature of Ḥanafī practice than anything else; that discourse was, in turn, highly ambivalent towards few of the major issues of the times such as the appointment and competence of judges, the massive state ownership of rural lands, and procedures in criminal investigations, or lack thereof. Moreover, sultanic legislation, which in some instances was contrary to the spirit of Ḥanafism (interest loans are one such example), had its own discourse and grammars; the grip of the sharī'a courts over complex cases loosened throughout the nineteenth century as more specialized courts and majālis were created; those, in turn, instituted their own discourses and grammars. What is striking about the Damascus majlis, which had to adjudicate on substantial issues whenever it was confronted with a hard case, was a discourse structured not upon a legal but political language, even to such an extent it could hardly be called "legal." To be sure, the legal side predominated in more routinized cases, and even in a few "hard" ones, but the "politicization of the legal"—especially when it manifested itself so bluntly and openly—implied a failure to depoliticize society by means of the legal. In fact, a handling over of "taxation" problems to the judicial apparatus would have freed political institutions from the burden of decision-making in that area. However, the policy of distributing and allocating iltizām rights in terms of allegiances to the state renders it more problematic to consider "taxation" as a legal matter only.

Consider for example the petition **[C 9-2]** presented to the majlis on behalf of the inhabitants of the village of Dūmā, which despite its simple framework and an incomplete ruling, is nevertheless suggestive. (Another major difference with the sharī'a courts was that the latter handled cases mostly between individuals, and rarely as class-action lawsuits, while the majlis cases were often—but by no means all—on behalf of collectivities: that was mostly due to the fact that peasants, among others, implicated in one way or another in the iltizām process, usually labored and paid their dues as a collectivity, and hence filed action as a group.) The inhabitants were complaining against the creditor of their village (commonly known as *ṣūbāshī*) who had just died ten days ago, and were requesting a revision of the terms of their agreement with their deceased creditor in a more equitable way. The villagers described their recently deceased *ṣūbāshī* as having "burned us with the profits [he imposed]

[*ḫaraq-nā bi-l-murābaḥāt*] and other [impositions] and led us to destruction [*kharāb*]."[23] The use of *murābaḥa*—either as "profit," or a markup contract[24]—a term to be employed in later firmans when legalizing the loan-with-interest custom (C 10-2 *infra*)—even though Ḥanafī texts limited *murābaḥa* to a "resale with stated profit"—is an indication of the commonality of such practices and their precise link to the iltizām system and mīrī collection, so that the majority of the peasants found themselves in an impossible situation—to request loans from professional creditors in order to clear their mīrī dues; that in turn meant the payment of high interest-loans.

According to the petition, a previous settlement had been reached with the authorities of the majlis so that the loans would be collected in multi-installments over a period of several years. Thus, out of the remaining debt of 105,000 piasters, the majlis agreed that reimbursements could be completed over three years, or 35,000 piasters for each year (all those agreements were drafted in writing, in documents referred to as *maḍbaṭa,*[25] with copies kept with both parties). When the village creditor died ten days prior to the petition's submission, a court had requested from the villagers to clear what was left of the original debt, namely 30,000 piasters. Even though the petition did not clarify to whom the payment should be made, it does seem, however, that the matter was brought forward in a sharī'a court by the inheritor(s) while clearing out the deceased's succession. The villagers, from their part, denied that they still owed their deceased creditor any money, and brought their witnesses and receipts to court for corroboration. The judge, having requested from the inheritor to see the *maḍbaṭa,* gave them a ten-day time limit; but as soon as their time ran out, the inheritor denied the existence of a document that allegedly sealed a debt contract between the two parties in question. The villagers therefore requested from the majlis to provide them with a copy of the document in order to pass it to the sharī'a court judge. A copy was indeed found in the minutes of the majlis, but for an unknown reason the original date of the contract was not reported in the petition's reply and the space where it was supposed to be noted down was left blank.

Despite the incompleteness of that case, it does provide us, besides few insights on debt-mechanisms among the peasantry, on the relationship between the sharī'a courts and the majlis. The main point was that a loan contract between the peasants of a village and their creditor had to be approved in the majlis rather than in a sharī'a court; but as soon as the deceased's succession

23. Majlis Wilāyet Dimashq, 52/74/25 Dhul-Qa'dah 1260 (December 6, 1844).

24. Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance* (The Hague: Kluwer Law International, 1998), 7.

25. A colloquial word, probably originating from *ḍabaṭa,* to check.

had to be dealt with in court and the loan issue came up, the judge requested a copy of the original loan contract, a request that was granted by the majlis. The question, therefore, is why a loan contract of this kind should be part of the majlis' territory? In fact, from a legal point of view, a loan contract should have been within the jurisdiction of the sharī'a courts which should have followed Ḥanafī practice on such matters. The problem, however, was twofold: 1) both Ḥanafī practice and the sharī'a courts did not acknowledge loans with interests as such (or with a *murābaḥa* surplus, as the sultanic firmans would say) because the *amwāl* were to be exchanged only on an "equal" basis, even though transactions are expected to generate a limited "profit"; this gap between canon law and customary practices was ultimately filled by sultanic ordinances as noted earlier;[26] and 2) the loans provided to the peasantry—and the above loan was a large one indeed—eventually became more of a political than a legal issue because of their direct link to the iltizām system and mīrī collection; in fact, such loans were supposed to keep the collection of mīrī dues following its own regular pace with a minimum degree of disruptions; the major source of disruption, however, was the inability of the peasantry to pay on time for a variety of obvious reasons. The creditors therefore—and they were of various backgrounds—filled that gap, and due to their crucial role in the process, they had to be protected by a *sui generis* institution like the majlis which, in its own right, was more decisive than the sharī'a courts.

But—this is the point—such solutions to longstanding political and social problems only aggravated the fragmentation of a legal system already suffering from the numerous patches it received over the centuries. To be sure, neither did it help in creating a more homogeneous code (a step that will be pursued later, but only by importing Napoleonic codes in extremis), nor in limiting the different conflicting judicial territories. The purpose of the majlis itself as a *legal* institution was indeed to bypass the limitations of Ḥanafī practice and "apply" that other parallel set of codes—sultanic legislation. Such a division, however, between two parallel sets of legislation and adjudication not only proves the difficulties of the legal and its limitations, but more important, it indicates that political overtones often trespassed over the legal so as to render the latter limited to *private* matters and disputes. In fact, because the depoliticization of taxation, land ownership, and rent, among others, proved a difficult matter, the legal had to be supplemented by other quasi-legal institutions whose sole purpose was to maintain the state's control over land, rent, and taxes. Depoliticizing land ownership, and the creation of a taxation system indexed on the value of rent, would have also implied a de

26. See *infra* Chapter 10 on sultanic legislation.

facto depoliticization of the administration of justice as a whole and a radical restructuring of Ḥanafī practice in such a way that it would have integrated basic procedural civil and penal matters. In the two above cases, the majlis either had to confront itself—as a body of notables—to a group of rural nobility with whom it was directly competing over the distribution of revenues in the province, and thus adjudicate accordingly, or adjudicate while sharing the administration of justice with the sharī'a courts (C 9-2). Both, however, show more an ineffective and crippled justice, weakened by its divisions, than a proper depoliticized administration.

In another similar case **[C 9-3]**, the inhabitants of the village of Ghazlāniyyah also petitioned for having been overburdened by their creditors.[27] That indeed seems to have been a common problem to which the majlis had to devote lots of its energies. The petition claimed that the villagers were worn out with debt to their *ṣūbāshī* and to the mīrī, in addition to several "debt receipts (*ḥawwālāt*)" that needed clearance. Then, after describing few difficulties that led in the course of that year to a bad harvest, the petition concluded with a short note summing up the creditors' function: they "strengthen and let us proceed forward [*yuqawwū-nā wa yumashshū-nā*]." The expression is less poetic than it seems: *taqwiya,* to strengthen, was used as a euphemism for "to credit" or "to give a loan." Thus, either the peasants or the majlis would make a request for a *taqwiya,* and this was no more but a step to ensure the payment of the mīrī on time. The only party that became "strengthened" in the process was the treasury while the peasants lost more and more of their resources.

The majlis requested the presence of the village's first *ṣūbāshī,* who duly apologized for being sick and who claimed that he had disconnected himself from the finances of the village; he also wanted a clearance of the village's account, to be worked out with its elders, and promised that receipts would be provided with all payments. A second creditor was then called upon who pledged to foster a close relationship with the village; such a promise, however, was accorded only on the condition that the other creditors—referred to as lenders (*dayyānah*) and *ustādh*s—would not be refunded, at the moment of threshing (*baydar*), before him: "he gave his guarantee to ensure the *amwāl* to the treasury [in due time] so that the mīrī does not get badly affected." In other words, what the *ṣūbāshī* was in effect requesting was that he would be clearing the mīrī dues on time for the villagers, and thus ensure that nothing would be delayed, on the sole condition that he should be the first one reimbursed, among all lenders, during the season of threshing. In a society where the political and economic were closely linked, all kinds of creditors were neither

27. Majlis Wilāyet Dimashq, 33/54/10 Dhul-Qi'dah 1260 (November 21, 1844).

engaged in a pure competition with one another nor freely competing on the market, and were politically protected for the simple reason that without them, the payment of mīrī would have lagged behind year after year. In that system, therefore, creditors cleared at least part of the mīrī—or "rent"—on behalf of the peasants; but in order to do so they were granted special privileges by state institutions, among them the majālis. All privileges meant to ensure one thing: that the creditors would be paid as soon as possible by the peasants, and if that did not occur, the payment of mīrī could slow down. Thus, the perseverance of the system rested on a "circle of debt" in which the peasants were the biggest losers: being for the most part unable to clear their dues on time, the state had to insure that at least part of the dues be granted from other sources—that was the main function of creditors/lenders.

> After consultation in the majlis, it was decided that since [the *ṣūbāshī*] Muḥammad ʻAlī Aghā al-Jaʻfarī guaranteed, while present in the majlis, to strengthen [*taqwiyat*] the people of the [Ghazlāniyya] village with whatever they need, from seeds or cows, in addition to the payment of the *amwāl amīriyya* that were requested of them from the treasury, on the condition that at the moment of threshing [*waqt ḥuṣūl al-baydar*], the revenues of the peasants [*maysūr al-fallāḥīn:* savings] should be bestowed to none of the lenders [*dayyāneh*] prior to the payment of all dues owed [to the primary *ṣūbāshī*] for having [submitted the mīrī] to the treasury and strengthened the peasants. If anything remains with the peasants, they will pay [from those savings] to the [other] loaners. Such a step is necessary to speed up [*tashhīl*] [the process of collecting] the *amwāl amīriyya.*

The political hierarchy created between creditors—or lenders—was an indication that they were not in competition within an economic market of buyers and sellers. Thus, the villagers were not strictly speaking of the "buyers" of goods in cash or kind, for which they had to add an "interest." Rather, they received an equivalent of their "rent," mostly in cash and partly in kind, which they refunded later—either totally or partially—from their produce. The peasants had therefore no choice but to comply to the "circle of debt" instituted by the state: besides ensuring the payments of mīrī at the required time, it was a system that generated cash more easily to the treasury since a full reliance on the peasants' revenues would have implied payments in kind for the most part.

The construction of the two-part text is in itself revealing. The villagers, having petitioned together as a collectivity, introduced themselves to the majlis as "your slaves (*ʻabīdu-kum*)," in an overall style that was visibly too complacent in favor of the majlis. Regarding their request, the text simply demanded, rather awkwardly, that not all debts be cleared at once: it was thus indirectly requesting that a priority be accorded to few lenders over others. Thus, whereas the sharīʻa court texts were structured around well crafted

formulas, and, in the case of a litigation, the language was accusatory, the petition and reply style of the majlis had no such binary organization based on a plaintiff-defendant structure of events. The majlis' handling of petitions shows a less structured pattern of cases with more unpredictable rulings, even though debt petitions, due to their sheer number, were not "hard" by any standard. In any case, this is a far cry from the routine rulings of regular judges: had a separation between the political and economic spheres existed, the majlis cases would have for sure been within the jurisdiction of professional judges.

A plea for mercy

To be sure, the petition system rested on a major fiction—that of collectivity. The collectivities that petitioned the majlis lacked a clear legal institutional framework: Who were the *ahālī* of a village and what legal rights did they enjoy as a collectivity? Thus, in the sharī'a courts, people took action either as individuals in their own name, or, when a number of persons were involved, they usually were part of an institution, or a contractual representation (a guild, beneficiaries of a waqf, etc., but then each one of the plaintiffs and defendants was individually named). Since for Ḥanafīs the category of class-action suits is not clearly defined as such, individuals should be clearly delimited since a ruling cannot address a no-name-collectivity. That was not required for the majlis petitions: collectivities could be anything from a clan, such as the Ḥarfūshes, the inhabitants of a village, or even the entire population of Bilād al-Shām for that matter; and it did not matter how vaguely defined those collectivities were. But was there a class-action notion with which the regional councils did operate?

> **[C 9-4]** A copy of a petition from all the inhabitants of Damascus[28] and Ḥimṣ to the Sublime Porte requesting a plea for mercy [*istirḥām*]. Let God preserve the sublime state of the sultanate so that justice prevails.
>
> The populations of the villages of Damascus and its four *nāḥiya*s, in addition to Ḥūrān, Ḥimṣ, Ḥamā, and Ma'arrat [al-Nu'mān] would like to inform [the majlis] that the heavenly epidemics [*āfāt samāwiyya*] which became known to and heard by everyone, in the eyālet of Damascus—that same eyālet which is the gate to the honorable Ka'ba, and a holy land where Prophets have rested—those [outbreaks], resulting from extremely cold weather, have destroyed vegetables, fruits, and plantations, and in 1259-60, up to this day, locusts

28. The expression was inaccurate because what was denoted were the inhabitants of the villages in the Damascus region, see below.

abound, thus provoking the death of cows and cattle from diseases. Moreover, those wretched Bedouins [*ashqiyā al-ʻurbān*] have been dominating the Ḥūrān, while the Druze have exercised their domination over the Biqāʻ, and this year [1261] the Bedouins planned several attacks on many *nāḥiya*s and *ʻashāyir;* their presence thus created a great deal of damage and a total hardship. Soldiers had to be dispatched in order to protect the villages and *raʻāyā* from those wretched people, so that many villages have been destroyed as a result of those heavenly epidemics: some had all their belongings totally wrecked, while others had only half to a third damaged. Some people left their villages to more secure places outside the eyālet of Damascus. [If those people] were forced to clear the rest [of their mīrī dues] they would have perished as everyone else did because of the *amwāl* that were imposed on them and whose value has increased during the Egyptian period [1832-40]. Thus, in Ḥūrān, ʻAjlūn, and other places, the value of a single *jift,*[29] prior to Egyptian times, was a hundred piasters in such places as Aleppo and Sidon; but, during the Egyptian period, [it] has increased up to three-hundred piasters,[30] not counting the barley and wheat,[31] and not counting also the legal tithes [*al-taʻshīrāt al-sharʻiyyah*].[32] [All that] adds up to three-fourth of the revenues of a *jift.* The situation [of those villagers] has deteriorated because of those heavenly epidemics and other fated events, and, as a result of all this, it seems opportune [at this juncture] to request your forgiveness...in order to avoid the degradation of the situation of the *raʻāyā* [because of the heavy load] of the [requested] *amwāl* which consist

29. Probably an abbreviation of the Turkish *çiftlik,* or *mazraʻa,* farm.

30. Probably the land-tax, usually referred to as *verghi,* paid in cash, and assessed on the basis of the value of the land.

31. This seems the part of the mīrī paid in kind.

32. It is not clear what those *taʻshīrāt sharʻiyyah* referred to. The *ʻushr* tax was, in the classical Ḥanafī system, a land-tax representing roughly one-tenth of the produce; it also implied that the property was "owned" by its landlord who paid the *ʻushr* to the treasury. In the context of the Ottoman land tenure system, with its massive state ownership of rural lands, the *ʻushr* was usually referred to in its plural variations, either as *aʻshār* or *taʻshīrāt.* When the land was privately owned, it paid one-tenth of its produce to the treasury as tax; but what if the land was mīrī? What would the meaning of ʻushr be in that context? Surprisingly, court and majālis documents (in addition to consular reports) often mention *aʻshār* "taxes" in the context of mīrī lands (or waqf for that matter): it could well be that the *aʻshār* were nothing but the *amwāl amīriyya,* and the term was kept as such either out of custom or because the peasants did effectively pay no more than one-tenth of their produce as mīrī, which is unlikely considering all the complaints received by the Damascus majlis alone. Thus, for example, for the year 1296/1880-81, the total fiscal revenues for the sanjāq of Damascus amounted to 15,751,649 piasters, out of which 7,615,069 piasters were collected as *aʻshār* and 5,567,575 piasters as *verghi,* or land-tax; clearly, in that case, the *aʻshār* were synonymous with the *amwāl amīriyya,* and amounted to much more than the classical one-tenth, thus suggesting an adaptation of obsolete legal terms to contemporary situations; however, the rationale behind the terminological choices for tax and rent is far from clear (Ghazzal, *L'économie politique,* 98). Since when was there a simultaneous land-tax (*verghi*) in addition to a "tax" on the produce, the *ʻushr?* Was that an outcome of the 1858 Land Code? Or was the land-tax, following the classical Ḥanafī tradition, solely imposed on privately owned lands?

> in the following: the *virghu,*[33] the *ta'shīr shar'ī* [tithe, or mīrī], the customs, and the *jizye* [a poll-tax on non-Muslims]. With the increase in the amount of the *amwāl* [paid as "taxes"] since Egyptian times, as explained above, and the coming down of epidemics [*nuzūl al-āfāt*]—from the cold, locusts, the Bedouins, death of the cattle, etc.—...[we are pleading] for mercy [*istirḥām*]... in order to protect the *ra'āyā* and the *amwāl amīriyya* because the eyālet of Damascus assumes such things as the honorable Ḥajj and the army expenses of the province...[34]

Even though the majlis did not bother to reply to that petition, its importance proves crucial for an understanding of the various types of "taxes," the language of "popular pleas," and the relationship between the peasantry, on the one hand, and the Bedouins, and various confessional groups, such as the Druze, on the other—all of which, together with the cold, locusts, and death of the cattle, were portrayed as natural phenomena whose mere presence in a particular region caused ravages and destruction. To be sure, the Bedouins at that time—the 1840s—were autonomous, and not only were they outside state law and control, but they imposed their own fees on anything from the pilgrims to the peasantry. Thus, by the time the "rule of the *mashāyikh,*" as it was known, deteriorated in the 1860s, when the state began its control over the regions traditionally dominated by the Bedouins, the latter added to the misfortunes of the peasantry by collecting their share of the mīrī from them.[35]

Why did the majlis leave the petition with no reply? After all, a specific request was made by the *ahālī* consisting of a reduced mīrī for the year in question; enough reasons were provided; and the majlis should have known how convincing the arguments were. One reason could well be that the covered area in crisis was too broad—the entire province of Damascus up to Ma'arrat al-Nu'mān north. In other words, the request was more symbolic than real since the entire populations of the province of Damascus could have no real legal existence either for the majlis or a courtroom for that matter. Four questions follow from such premises: 1) Who drafted the petitions? 2) For what purposes were they drafted? 3) Why were copies sent to the majlis? and 4) Why did the majlis include them in its minutes considering that it had no intention to reply?

As a reminder, the petition, unlike the ones analyzed before, was addressed to the Sublime Porte and not to the majlis itself—only a copy was passed to the latter. The majlis was therefore not requested to reply directly, but nevertheless

33. Written *wirkū* in Arabic, or the land-tax, based on the value of the land.

34. Majlis Wilāyet Dimashq, 100/135/5 Muḥarram 1261 (January 14, 1845).

35. See Andrew Shryock, *Nationalism and the Genealogical Imagination* (University of California Press).

kept a copy as part of the petitions it regularly received. Even though that petition was broader in scope than the ones the majlis was accustomed to, the tone, however, was very much similar to other complaints about the iltizām system. A striking similarity lies in not addressing the iltizām issue frontally; thus, even though the mīrī dues amounted to no less than the three-fourths of the produce, leaving the peasants with barely one-fourth for their survival (supposing, of course, that no one else came with additional obligations), "the cold, locusts, Bedouins, and the death of the cattle, among others," were perceived as some of the major causes—as phenomena of nature—for the peasantry's impoverishment. Moreover, the *raʿāyā* had to be protected on a similar ground with the *amwāl amīriyya:* without the *amwāl,* the pilgrimage could not be assured, and entire areas would be left without the protection of the sultanic soldiers. It was also necessary in order to keep up the province of Damascus—often referred to as *baldah*—and its cities in good shape. This all rendered the *raʿāyā* "immersed in the gifts of the sublime state [*maghmūrīn bi-inʿāmāt al-dawla al-ʿulya*]," so that there was no point in complaining about anything. Indeed, the causes for "disasters" have been naturalized to the point of eliminating their social roots altogether.

Such self-congratulatory language, even though supposedly addressed by the inhabitants of a province that suffered tremendously in the last two years, was common to other petitions as well. It belonged to the fictional nature of such texts to be self-congratulatory and to speak in the name of the people, for the sake of their well-being and safety. In fact, the incipient role of such texts came precisely from their fictional side, and in a way was characteristic of all political and legal fictions; it was by making some unreal entities function as if they were real that fictional texts were so effective. Thus, the idea of the entire population of the province of Damascus petitioning the Sublime Porte had no real existence, and it was precisely because of its non-reality that it became such a necessary legal and political tool. Things were always accomplished and performed in the name of other individuals—as a collectivity—but since the idea of a collectivity is both a political and legal fiction, it becomes actualized only in the opinions and codes that derive from it. Thus, the death of the *kharāj* payer was one of those legal and political fictions upon which the entire landownership of the empire rested; in itself it was only a fictional idea, but several opinions, firmans, and laws were enacted on the basis of such a fiction: in other words, the fiction became actualized in those same normative rules. Similarly, the legal and political fiction of the population of a province seeking the mercy of the Porte was essential, less for the idea itself than for its consequences. In fact, in a society where the people were in no position to elect a body of legislators, the political fiction of the raʿāyā requesting something from their sultan was more than essential because it

portrayed the people in a position of demanding legal action of some kind; the sultan's legislative effort was therefore deployed as a result of the *ra'āyā'*s demand for a just and equitable order of things.

To analyze the discursive structure of petitions drafted in the name of fictional collectivities, the role that powerful symbolisms play while engendering fictional constructions needs further consideration. Besides the fact that symbolisms create a level of reciprocity vis-à-vis sultanic legislation—otherwise the sultan would have been perceived as imposing his legislation on his *ra'āyā*—collective petitions attempt to portray the dangers, both natural and social, that surround a locality, as part of a divine order of things so that "state" and "society" become naturally irresponsible. Natural—or heavenly, as they were called—misfortunes come first—epidemics, floods, severe cold, dryness, low rainfalls, to name but the most common—while "social" misfortunes are subsumed under the heavenly ones and come only next in order: Bedouins, Druze, or Shī'īs imposing their arbitrary rule on a locality; or multazims levying more mīrī than what they were allowed to, etc. In the same way that the natural is depicted as having occurred for no specific reason and has to be accepted as such, social misfortunes are perceived in a similar way, namely as events with no specific (social) logic. All such unfortunate events, however, whether natural or social, were in need of sultanic ordinances to recreate order and harmony—hence, the *māl mīrī* had to be reassessed because of such misfortunes. In short, fictional petitions were an essential ingredient of many legal and political texts precisely because of the reciprocity that they engendered; they were drafted in such a way so as to create a two-way communication fiction between the *ra'āyā,* on the one hand, and the sultan and his bureaucracy on the other, not to mention the various intermediaries such as the regional councils. That was a dimension that was less necessary to the sharī'a courts since litigations, contracts and obligations, and even torts and crimes, were for the most part a pursuit of private interests. The courts thus pushed for no claims towards the global well-being of a community—they simply assumed it in their practice.

Family intrigues

The petitions' grammar was so essential and so characteristic to the majālis that even privately signed petitions were drafted as if they had a higher purpose—a tone that the sharī'a courts lacked. Consider for example the petition signed by a certain Muḥammad al-Wafā'ī al-Ḥumṣī **[C 9-5]**. He made the claim that he had just left his family, children, and the mosque he was in charge of specifically for the purpose of coming to the majlis in order

to introduce its members to the condition of the village of Muhājiriyyeh.[36] His uncle, ʻUmar Efendi, had, for his part, claimed that the village was his own *çiftlik* (farm), thus denying its ownership to a waqf. Ḥumṣī therefore urged the majlis to transfer the case to a sharīʻa court—that in itself is an indication of a crucial role for the majlis—some kind of a higher "appeals court" that either made final decisions that "lower" courts were unable to handle, or routed cases to the other courts. As before, the question needs to be raised as to why a conflict over the status of a *çiftlik* was primarily handled by the majlis rather than by a sharīʻa court, in addition to the reasons behind the petitioner's desire to have his case transferred to a sharīʻa court: What were the real benefits? After all, sharīʻa courts should have in principle been ready for such cases, especially since accusations of alleged "occupation [*waḍʻ yad*]," whether real or fictitious, of milk and waqf properties were quite common.

Interestingly, this case was structured around a litigation similar to ones common in sharīʻa courts—with two disputants. A crucial person here turned out to be the general administrator of waqfs in Damascus, Aḥmad Efendi Mālikī Zādah, whose official title was *nāẓir muʻadjilāt al-awaqāf; muʻadjle,* for both *mālikāne*s (lands granted as life-appointments) and waqfs, probably referred to lump-sums that had to be paid to the treasury. It was indeed Mālikī himself that directed all hearings and requested that the defendant, ʻUmar Efendi ʻAṭā'ī Zādah, be present at the majlis. The plaintiff claimed that he was himself an administrator of a mosque in the city of Ḥimṣ, based on an honorable *berāt* dated November 10, 1842; that appointment gave him supplementary duties, besides administrative routine tasks, such as teaching, the *imāmah,* and that of *khaṭīb* as well. One of the properties belonging to the waqf was the village of Muhājiriyyah that his opponent was claiming as his own *çiftlik:* Ḥumṣī claimed that he leased it to ʻAbdul-Raḥmān Aghā, an ex-*muḥaṣṣil* of al-Muʻarra.

The defendant responded that he has been in possession (*mutaṣarrif*) of the farm for fifty years, which was originally assigned to him as mīrī (*maqṭūʻ li-jānib al-mīrī*)[37] based on several *sharṭnāmah*s, in which he also possesses both *mashadd maskeh* and *kirdār* rights.[38] In 1835, he leased it with few other

36. Majlis Wilāyet Dimashq, 4/13/11 Shawwāl 1260 (October 24, 1844).

37. The reference to *maqṭūʻ,* "assignment," might imply that the property was not the defendant's own but that the sultan assigned it to him in order to collect its mīrī. The difference between milk and *maqṭūʻ* properties was that the latter could neither be sold, inherited, nor bequeathed as waqf since they formally were state properties. They also differed from the other regular mīrī properties in that they were life-terms assignments.

38. See chapter 3 on contracts for a discussion of those and related terms. For our purposes here, it is enough to know that both implied exclusive "rights of cultivation," which like the *khulū,* could be purchased or transferred by tenants.

properties to a certain Salīm Bek until the latter left for Egypt.[39] He then rented it to the aforementioned ʿAbdul-Raḥmān Aghā (whom the plaintiff had already claimed to have been his tenant), a rental that also included a few other connected properties; that tenant was also responsible, based on a *berāt* dated September 27, 1806, and then renewed in 1842, for the administration and teaching of the aforementioned mosque.

The plaintiff responded that the village belonged to his grandfather's waqf, and, based on the conditions placed on those properties, he became the appointed manager, spending some of the waqf's revenues on the mosque while the rest went to the beneficiaries. He added that ʿAbdul-Raḥmān Aghā was a tenant for three years, and then requested from the defendant to furnish official documents that would render his claims viable; he also urged him, if he had one in his possession, to show the waqfiyya drafted by a judge in Ḥimṣ and which was the one prepared by their grandfather (the defendant was the plaintiff's uncle). The defendant, however, promptly replied that he had no such waqfiyya and was never provided with one.

The plaintiff then unveiled to the majlis a document from the waqf's archives in which the defendant was acknowledging that the village was part of his (and the plaintiff's) grandfather's waqf; the document was in fact nothing else but the farm's lease with its *kirdār* and *manāfiʿ* to Salīm Bek towards the end of 1835. The rent would pay 500 piasters to the treasury and 400 to the waqf (an indication that a *waqf dhurrī* had, like any other property, mīrī dues—but what about a *waqf khayrī?*). It was then the defendant's turn to unveil another document outlining the conditions established by the founder and also containing the text of a lawsuit between all the founder's children, males and females, and in which he personally won the case over the waqf's administration. He also brandished the text of a firman establishing that the village was an assignment, *maqṭūʿ,* whose revenues should be at the disposal of the aforementioned mosque devoted to praying, preaching, and teaching. The plaintiff in turn exhibited another firman, dated April 13, 1794, establishing that the village, whose mīrī dues were fifty piasters, should have its revenues devoted to the preaching and teaching at the same mosque.

Finally, the defendant was requested to disclose all documents that would make his case stronger. He thus unveiled a document from the late Aḥmad Pasha al-Jazzār (who, as his name indicated, was a tough and highly influential wālī who governed over vast domains from the small coastal city of Sidon), dated January 9, 1804, and addressed to the *mutasallim* of Ḥimṣ and Ḥamā, informing him that the defendant of the current case had acknowledged the existence of two farms, one of them in Muhājiriyyeh, whose mīrī dues

39. This might be an indication that Salīm Bek was an Egyptian who moved to the area with or after the Egyptian troops in 1832 and left with them in 1840.

amounted to 474 piasters, and whose revenues were to be allocated for the mosque above.

The majlis, realizing that all those claims and documents amounted to nothing but a pile of contradictory evidence, requested a duplicate of the original waqfiyya, but to their surprise, both parties denied having a copy. The general administrator of waqfs therefore decided to transfer the case to the upper dīwān.[40] But, in a surprising move, and immediately after the text of the majlis' *procès-verbal* (referred to as *jurnāl*) in which it openly confessed in its concluding remarks that conflicting evidence from both sides renders any ruling difficult, the majlis accepted another signed petition from the plaintiff (that he wrote all by himself) and in which he pleaded the majlis to release an official document acknowledging that the status of the village lands was indeed waqf "since it has become known to you, respected members, that [they were bequeathed to] the waqf of the mosque of imām 'Umar." Then, in what seems to have been like a final closure to the case, the majlis accepted the plaintiff's request on the basis that one of the documents presented by his opponent and emanating from the late wālī al-Jazzār, recognized the waqf status of the village and its lands; and now that that status had been accredited, said the majlis in its final reply, the *manāfi'* that the defendant was proclaiming as his should be checked upon and legalized in a sharī'a court.[41]

A routine dispute over a family waqf thus fell within the jurisdiction of the regional council rather than adjudication in a sharī'a court: Was it because of the mīrī dues that even exceeded the beneficiaries' revenues? Two members of the same family but of different generations thus claimed that they were the sole beneficiaries of a grandfather's waqf and denied to each other any benefit from the totality of those same rights. In the context of a sharī'a court, the judge would have requested an examination of the original act of the waqf—that is, the written words of the founder; problems arose, however, whenever part or all of the waqfiyya's act was *orally* modified by the founder prior to his or her death: witnesses had to be brought in to testify that they indeed *heard* the founder say so-and-so on such-and-such on occasion, and Ḥanafism was overall favorable—at least since Ibn Nujaym—to the oral alterations of waqfiyyas (C 8-1). So why was that waqf case, between uncle and nephew, brought to the majlis rather than a regular sharī'a court? Judging from the

40. No indication was provided as to what the *dīwān al-'ālī* might have been. It does seem, however, that it was one of those councils—probably headed by the wālī himself—whose combined political and judiciary powers were at a higher level than all the Tanẓīmāt majālis.

41. The plaintiff's final request and the majlis' reply are both on p. 6 of the minutes, and both numbered (recently) as document 14, same date as the *procès-verbal,* October 24, 1844. A document was issued in response to the plaintiff's final demand confirming the status of the waqf; the text, however, was not attached to the minutes of the majlis.

few pieces of evidence outlined above, only one answer comes to mind: at least part of the waqf, if not all, was an assignment, *maqṭū‘,* going back to the last decade of the eighteenth century, and since assignments, *iqṭā‘āt,* were political in nature—the sultan assigned a *muqāṭa‘a* to a family as a sign of its loyalty to him—the confusing nature of this waqf had to be dealt with in a majlis rather than in an ordinary court—the latter were by definition non-political and usually limited to private matters. Thus, once more, the political nature of the land tenure system *ipso facto* politicizes the legal so that it was impossible for the regular courts but to restrict themselves to less ambitious cases which, at least on the surface, had no political implications.

Two levels need to be therefore considered: the ambiguities of the case itself and the procedures of the majlis: How did they differ from those of the sharī‘a courts in similar cases? Concerning the waqf itself, it needs to be known that a village that was initially granted as *maqṭū‘* later became one of the waqf's properties and survived for several generations. The assumption here is that *maqṭū‘* was a state (sultanic) assignment of a *muqāṭa‘a* granted to an individual or family, which stipulated that a lump sum had to be paid as mīrī. Because lump sums were generally good deals to the *muqāṭa‘a* holders, they were considered as special arrangements that usually were not transferable. Ḥanafī jurists were of the opinion that *maqṭū‘* properties could not be bequeathed as waqfs. So how did that particular village begin first as an "assignment" and end up, several decades later, as a private waqf with a small group of family beneficiaries?

Due to contradictory pieces of evidence from both parties throughout the hearing, the chronology of events was at best very fragmented. What is certain, however, is that the village and its lands were linked in some way to the mosque in Ḥimṣ, probably as a means to support it, so that the most logical solution to render such an arrangement permanent was to bequeath the village as waqf whose revenues would partly fund the mosque and partly pay the mīrī. That seems a logical and straightforward solution but, surprisingly, going through the details of the hearing makes it seem as if bequeathing a village to a waqf was an awfully complicated matter. The plaintiff's first claim was that an 1842 *berāt*[42] stipulated that he administers, preaches, and teaches at the mosque; he then added that one of the waqf's "units (*aqlām*)" bequeathed especially for the mosque was the Muhājiriyyeh village. And then later, while responding to his opponent's allegations, he added that the founder of the waqf was his own grandfather, a crucial declaration which he avoided earlier, probably because he possessed no waqfiyya as evidence. Still following the line of evidence

42. Or *barā'a* in Arabic, which literally translates as "innocence," or document, order, license; also as some kind of sultanic bull.

presented by the plaintiff: his final claim was that a 1794 firman "assigned" the land of Muhājiriyyeh in such a way that its revenues would serve the maintenance of the mosque, while fifty piasters should be paid as mīrī every year. But the plaintiff never made the full claim, as his opponent did, that the land was *maqṭū';* yet, one wonders whether it was possible for a land to be "assigned" specifically to a mosque without having the status of *maqṭū';* had it been a waqf by that time, its assignment to a mosque by a public firman would have been meaningless. Considering the textual order of the plaintiff's claims—the things he wanted to avoid at all cost came last—in all likelihood, the village was first assigned in 1794 as *maqṭū';* that assignment was enough to render it legally ineligible for a change of status into a waqf, and it is quite probable that the property never became a waqf in the first place, but specific arrangements were worked out by the plaintiff's grandfather so that it functioned *as if* it was a waqf.

The solution to the waqf's puzzle seems therefore in between the claims of both plaintiff and defendant. Thus, the plaintiff was pushing forward his claim of the village-as-waqf, ignoring altogether that it might have been *maqṭū'* because that possibility, based on Ḥanafī practice, would have rendered the waqf illegal. The defendant looked upon his nephew's claim as a threat since, not listed among the beneficiaries, his contractual rights with his tenants would have been illegal; so he argued that the village was first granted as *maqṭū',* whose grant was subsequently renewed (assignments were neither inheritable nor automatically renewable). Thus, it was indeed the defendant that first claimed that the village lands were *maqṭū';* that gave him the right to lease them for five years between 1835-1840. But it was only later, when pressed by the majlis for more evidence, that he proclaimed that his right of possession goes back as early as 1804 and was based on an official document from Jazzār, which he unveiled to the majlis. He also brandished a firman certifying the status of the village lands as an assignment, but no specific date was mentioned. Obviously, the weakness of his arguments lies in the fact that nothing shows that the assignment had been renewed. It could therefore well be that, profiting from this interim vacuum, the family transferred the status of those lands into waqf, even though nothing shows that that was legally completed, if it took place, through the sharī'a courts. There was, however, one document furnished, surprisingly, by the defendant himself in which the alleged conditions of the founder were stated in the context of a litigation among the beneficiaries on the issue of the waqf's administration. But such documents do not necessarily establish either the existence of a waqf or of a waqfiyya for that matter, since the beneficiaries could have staged a fictitious litigation in court in order to confirm their rights and render them irrevocable. The Egyptian period might have also contributed to a state of confusion, and

it is no coincidence that the only lease reported by both parties (since they both claimed that the tenant was theirs) took place during a period when mīrī assignments lost their source of legitimation.

Since property was, like kinship, a medium that instituted social relations, primarily as status between individuals, families, and groups, waqfs were tailored from one generation to the next by the specific needs of the beneficiaries in question. In other words, beneficiaries reconstructed all the legal, economic, and linguistic bases of their properties based on their own needs and those of their generation. Proprietors, inheritors, and beneficiaries do this on a routine basis in all societies, but what characterized Ottoman societies was an ambiguous notion of property. Since property was not fully commodified, the status that it brought and its protection from confiscation or fragmentation were essential. Moreover, status was not merely an outcome of "owning" a property, but also a product of sultanic assignments and the like; that, in turn, was fostered by the image of the sultan as guardian of his *ra'iyya*'s properties, and the ambiguities of the three basic land categories, in addition to the confusion between rent and tax.

This directly translated into the procedures adopted by the courts to help in land litigations. What is striking about the Muhājiriyyeh case, which as noted previously, were it not for the lands granted as *maqṭū',* it could have been one of those regular sharī'a court cases, was the total absence of witnesses, of references to past opinions from the canon, and, above all, the lack of an authoritative and well ritualized language where the judge would refer to himself only in the third person. Indeed, the much less informal *procès-verbal* of the majlis even lacked the minute descriptions of properties, common to sharī'a courts, and the repetitious statements required by Ḥanafī practice simply to confirm that disputants, representatives, and witnesses said and meant what they uttered in court. Did the different style of the majlis therefore imply another form of adjudication from the one accustomed to in the sharī'a courts?

The difference in style between majlis and courts was most obvious in the majlis' final decision. The three parts in the waqf's litigation played different roles and had no equivalent in the texts of the sharī'a courts. Thus, while a court's text consisted usually of a single texture that represented the judge's point of view—even though the judge was textually objectified in the third person—the waqf's litigation consisted of three parts, drafted separately over a one-month period: a preliminary petition was dated September 29, 1844; a *procès-verbal* was completed on October 6, 1844; and, finally, the plaintiff's final request and the majlis' ruling tool place on October 24, 1844. The petition prompted a hearing headed by Mālikī, the general administrator of awqāf, who, even though suggested that the case be reviewed by the higher authority of the

dīwān, did not see his wish implemented; instead, the majlis went ahead with its final decision-making. As Mālikī noted, the hearings did not contribute to anything decisive, but the majlis for its part saw in an 1804 document issued by Jazzār enough evidence that the village was indeed a waqf.

A sharī'a court might not have accepted that as enough data; its ruling would have typically been based on a combination of a couple of witnesses, opinion(s) from the canon, and a muftī's fatwā. This was because the idea of a just ruling was based on notions of fairness provided by a religiously rooted fiqh. Thus, when sharī'a texts portray disputants pleading their cases, their conflicting statements are typically left symmetrically distributed between opponents rather than within the disputing party itself: each party pleads in court for its own coherent view of the story, and such coherence turns crucial because judges had to choose between one of the two versions—it had to be either one or the other. Disputants thus narrated their own version of the story one after the other, plaintiffs first and defendants next, while following all restrictions imposed by the court procedures. Because no system of cross- or direct-examination was ever implemented, narratives were textually constructed into two distinct blocs, ready for the judge's final ruling. Even though at times judges did conduct some informal direct-examination with disputants and their witnesses, the texts nevertheless excluded such extraneous statements as if out of fear that they would have rendered a closing to the case problematic.

It was precisely that kind of textual construction that the majlis avoided. For one thing, the legitimation process was different: notables instead of judges and jurists, and an administration of notables instead of a religiously backed judicial system. Majlis petitions thus ended up much less structured than regular court cases with far less predictable outcomes. And since politics was always at stake—primarily to ensure payments of the *māl mīrī* and the state's control over rent—rulings ought to be reconsidered in this light too; thus, favoring a nephew over his uncle in a waqf's dispute might not only be a question of unveiling the right documents at the right moment.

Which labor laws?

Many of the majlis cases seem to be anxiously revolving around the crucial issue of the nature of labor legislation in the empire: Were the peasants legally protected against their landlords, creditors, state agents, and multazims, and which labor laws granted them any form of protection? Or was the adjudication of the majlis an indication that such a legislation did not effectively exist and was only a piecemeal effort? Majlis documents tend overall to point to an

effort by that institution to define and protect some labor categories, without, however, any general outlook on the matter. And with Ḥanafism adhering to its old notions, "labor laws" were at best a piecemeal effort with more political than legal significance.

In a petition that originated from the village of 'Udadah which belonged to the waqf of al-Ḥarmayn al-Sharīfayn **[C 9-6]**,[43] it was noted that, as customary, part of the produce was collected through the beneficiaries, while the other part paid to the mīrī. Even though the amounts—in kind—were kept the same over the years, the problem, as depicted by the villagers, was that in the last few years, the way those quantities were measured—or the *mudd makyūl*—had been altered; of course, that was a way to increase the dues to both waqf and mīrī. Still, according to the villagers, they were unable to pay their dues. The case was thus handled by Mālikī, the general administrator of the awqāf in Damascus, on behalf of the majlis.

While reviewing the dues for the years 1258-60/1843-45, Mālikī noted that they were only partially paid, even though the revenues were measured following the unit of the "sealed *mudd,*" as practiced elsewhere in the wilāyet. The majlis replied that knowing what the situation of the village was, and considering that it was paying its produce to both the waqf and mīrī, "it would therefore be preferable to accept [the villagers'] condition as it is, and as much as they can afford [of their revenues], so that nothing is lost either on the waqf or on the mīrī... and to help in the construction [*'amār*] of the village." Needless to say, the majlis was working for a compromise, avoiding either a solution by force or one that would request the villagers to submit all their late dues at any cost. Mālikī, however, was not that enthusiastic for that kind of solution, fearing that it would become a habit for the village of not paying their full dues, and might establish a precedent with other villages and localities. He also pointed out that their back dues were quite impressive to the point that it might hurt the Ḥaramayn waqf. Mālikī thus suggested to let them fully pay their dues for the current year, which was nearing towards its end, and to pledge the rest over several installments. In short, he opted for a no compromise solution.

For its part, the majlis found that the waqf's warehouse was in need of barley for the current year (1844-45), and since the situation of the peasants was dire, they needed to be recalled in order to work with them on a possible arrangement concerning the dues of the last few years. Their elders came to negotiate and claimed that since the threshing season (*waqt al-baydar*), they gave enough barley to the waqf, and when the mīrī dues—referred to here

43. Majlis Wilāyet Dimashq, 84-85/120/25 Dhul-Ḥijja 1260 (January 5, 1845).

as *dhakhāyir*[44]—were incessantly requested from them, they had to sell for this purpose enough quantities of barley (this might be an indication that the *dhakhāyir* consisted of cash payments). This has depleted the villagers to the point that they did not even have enough barley and wheat for their own consumption. In its final decision, the majlis recommended that, considering the sad state of the village, it was advisable not to push too hard on the villagers since "justice [*'adāla*] requires helping the *ra'āyā* by strengthening [*bi-l-taqāwī*] their produce with the other things,[45] especially for a village in bad shape." So the majlis maintained its previous decision, namely that the villages should pay as much as they could for the current year (1260), while the rest, including late dues from the previous years, should be paid in installments.

Before looking at the case in more detail, let us glance first at another similar one which also dealt with the crucial triad of villagers, the mīrī, and the majlis **[C 9-7]**. In our second case, the petition was signed by Muḥammad Aghā Khayr, a privileged peasant (sharecropper) working under the special category of *shaddād* (pl. *shaddādūn,* or *shaddādah*).[46] Special here means that this privileged category of sharecroppers kept more of the produce to itself than what the other peasants did on average, was given special assignments (for example, on lands that were hard to cultivate), and was granted specific arrangements on mīrī payments—precisely the subject of the current petition. Thus, in this case, the *shaddād* in question, even though was working on a parcel of land (referred to as *ḥānūt*)[47] in the village of Jisrīn, benefited from a special arrangement with the fiscal authorities allowing him to pay his mīrī dues on his own, that is, separately from the rest of the peasants in the village. Why was that so? Simply because some sharecroppers produced much more than the average peasant: thus, out of the 44,531 piasters that the village as a whole owed to the mīrī each year, Khayr paid on his own 10,807 piasters—or one-fourth of the total produce for a single sharecropper. Since the landowner

44. Also: *dhakhā'ir.* Ibn 'Ābidīn once mentioned this term in a derogatory tone, noting that the *dhakhā'ir* extracted by force from the peasantry were illegal and surpassed by far what, in classical Ḥanafī literature, he referred to as the *kharāj muqāsama;* otherwise, he made no effort to clarify the meaning of the term nor its use within the mīrī system (no chapter at any rate was devoted to the mīrī in the entire *Radd*). From a linguistic point of view, the origin of *dhakhāyir* in official Arabic could well be *dhakhīra* (pl. *dhukhur,* supplies, stores, provisions); thus, *dhakhāyir* seems nothing but a colloquial plural to *dhakhīra,* and probably referred to one of those parallel mīrī dues, such as *mubāya'a,* and apparently imposed in addition to the regular *a'shār* and *amwāl amīriyya.*

45. The text left those "other things" unspecified.

46. Majlis Wilāyet Dimashq, 149-150/189/10 ṣafar 1261 (February 18, 1845).

47. Plural *ḥawānīt;* the origin and exact meaning of the term are unclear; the literal meaning could either refer to a store, shop, or a tavern.

in this case was no one but the state itself, it was understandable why such special arrangements were promising: a better production for one, and the mīrī was paid promptly on time. To be sure, those privileged sharecroppers did not work solely on their own; they hired cheap labor from the villages they were associated with, so that their produce was not solely their own. Besides a better management of their production, their mode of payment of the mīrī resulted in better profits: "the māl [mīrī] specific to [Khayr's] *ḥānūt,* in the aforementioned village, is paid [*yufraz*] to the treasury on its own in three installments, and he himself guarantees its payment to the treasury without the intermediary role of the peasants [*bilā wāṣiṭat al-fellāḥīn*], so that he frees himself from the intrusion [*mudākhalat*] of those peasants." In short, a privileged sharecropper was someone working independently, with laborers he hired on his own, without any intervention from the rest of the village, and with his mīrī dues paid independently from the rest.

That, however, did not happen without a few problems. As in any system, nothing functioned without few glitches. The purpose of the above petition was to primarily ensure that the privileges would be maintained: that the mīrī would not exceed the one-fourth of the produce of the total village, and that no "special taxes" would be imposed; but Khayr also requested that, as with all the other villagers, his installments be reduced to two only—one in wintertime and the other one in the summer. Reducing payments to two installments was of course an additional privilege on the top of all other ones, and the majlis added in its ruling that all what was requested from him "is that his behavior [*sulūk*] in the village be kept on a par with the other Damascene *shaddādah,* which do not pay any of the *mubāya'āt, ṣakhr,* and *dūd,*[48] among others, but are limited to the *dhakhāyir* only because they practice their cultivation by hiring [peasants] [*yashuddū filāḥatu-hum bi-l-ujra:* they receive a salary for their labor?] and pay their own *dhakhāyir* to the treasury by hand [or: from their own hand]." Understanding *dhakhāyir* in this context requires first clearing out the ambiguity regarding "laboring with an *ujra*": Was that an indication that the sharecroppers' contract with the state-as-landowner implied receiving an *ujra* for the performed labor? And did that *ujra* consist in keeping part of the produce? In that case, the practice was close to what early Ḥanafīs understood by the *kharāj muqāsama.* But the sentence is still ambiguous because it could also mean that the sharecroppers relied on salaried labor to increase production.

Whatever that may be, the two cases (C 9-6 & 9-7), both of which were based on petitions requesting changes in the modes of payment of mīrī dues,

48. Even though the *dhakhāyir* and *mubāya'āt* seem to have been the two most common "taxes" imposed at the margin of the mīrī, their exact nature, together with the other "taxes," is still unknown.

bring forth to light the broader question of labor relations in the region: 1) Were the laborers legally perceived as working under contract?; and, 2) What kind of "protection" did a contract, if any, provide to the laborer? Both questions presuppose a set of complex legal, political, and philosophical (epistemological) arguments that fall beyond the present chapter. Ḥanafīs perceived a tenancy contract (*'aqd ijāra*) as the basis of any relationship between landowner and the tenant-farmer. It was a contract that gave the landowner the right to establish the property as formally his; it also divided the tax and rent between landowner and tenant on a fair basis: a rent was paid to the landowner in lieu of the tenant's right for using the land; while the landowner paid either the *kharāj* or *'ushr* to the state. The point is that such a form of using someone's else land, laboring on it, and paying a rent for the right to use the land, was contractual. Late jurists, such as Ibn 'Ābidīn, were still in favor of such contractual settlements, in particular if the land was milk or waqf; but considering that the bulk of agrarian lands was mīrī, how could such a contractual form be effectively applied? Jurists of the Ottoman period not only avoided such questions directly, but also kept the timār and mīrī systems lingering in the dark.[49]

The fact was that the majority of the peasants worked under extreme conditions of corvée labor—with no contracts of any kind. The *amwāl amīriyya* that the majlis documents referred to frequently were nothing but the rent that the peasants paid to the state; in addition all kinds of "taxes" and surtaxes—or should we say an "extra-rent"?—at the margin of the gross rent; those were so numerous, with so many names, that the majlis did in fact spend much of its time attempting to define them: *dhakhā'ir, mubāya'āt, ṣakhr, dūd,* etc. Some of those marginal rents attracted the attention of jurists, only to dismiss them altogether: "what has been agreed upon in the sultanic registers[50] was based on the fact that only these amounts should have been collected from the farmers who [are entitled to] keep the rest [of their produce]. But the reality in our time is contrary to this since what is unjustly collected from them now, known as the *dhakhā'ir* and the like, is too much, even equal in some lands to the entire produce. This is extracted from them even when the land does not produce anything..."[51] And Ibn 'Ābidīn then concluded: "It is therefore illegal to help the [tax-farmers] in their injustice and it should be looked upon as to what the lands can afford."

Considering that Ibn 'Ābidīn did no more in his conclusion than reiterate a previous opinion of another Ottoman jurist, Khayr al-Dīn al-Ramlī, the position

49. See chapter 4 *supra.*

50. More accurately: sultanic ordinances.

51. Ibn 'Ābidīn, *Radd,* 4:188-89. The full passage was quoted earlier in our discussion on custom.

of those jurists was more moral than legal since it did not establish (or propose) much of a legal framework to deal with the issue. In other words, jurists kept all along a passive resistance to the Ottoman land tenure system, but fell short of suggesting any new contractual basis for labor relations. Since even the late Ḥanafīs had very little to propose—except perhaps to indirectly suggest that the old notions of *'ushr, kharāj,* and *ujra* ought to be reconsidered—on which legislation did the majlis base himself in his rulings? Could it be that old sixteenth-century qānūnnāme and sporadic sultanic firmans served as the basis for the majālis decisions? Even though the current status of scholarship does not encourage reliable answers to such questions (much is needed still in the study of Ottoman law), suffice it to note that the majlis very rarely mentioned any legal texts (on one such occasion, it was related to a penal qānūnnāme), even though it did occasionally receive such texts and approved them article by article (for example, a text legislating the status of awqāf). This is not to suggest that the majlis acted in some undefined legal void, or that it acted solely on its own, with undisputed freedom.

To understand how a political institution like the majlis related to law, it needs to be first acknowledged that the legislative ground on which it relied was quite limited. So how could such a *sui generis* institution function? If, as we proposed earlier, a judicial apparatus is not simply a set of laws, regulations, codes, or opinions to be applied, but is constructed as a totality of various levels of discursive practices, then the majālis of the Tanẓīmāt were one such level. In fact, the majlis experience shows that a decision-making process was not only associated with applying or interpreting a known rule, but also in creating discursive practices whenever the law was either silent or left much room to operate through. Consider, for example, the last majlis case we briefly dealt with thus far—that of the *shaddād*s (C 9-7). It is questionable whether any legal text seriously considered this professional category of sharecroppers either in delimiting them as group, or in defining their rights and privileges, or in determining their relationships and status vis-à-vis other peasants, whether professional or not. It is also doubtful whether the majlis relied upon broader legislative texts, such as various labor legislations, its conditions, or the protection of laborers from accidental misfortunes. But the question begs for an even broader one, at least larger than what the "rights" of the sharecroppers and peasants were, so as to include the populations—or "subjects"—of the empire as a whole: Was "society" as a whole protected by any form of political covenant?

We have noted earlier, regarding the land issue, that the late Mamlūk and early Ottoman Ḥanafism represented the sultan as the guardian over his *ra'iyya,* and that the *ra'iyya* were in turn considered orphans in need of care. Besides the essential nature of such representations regarding land, their aim

was essentially political since they represented the sultan in the role of a shepherd who enjoyed almost unlimited powers regarding the lives, security, and property of his empire's subjects. In effect, the security and well-being, not to mention the happiness, of those subjects was granted by the sultan, and the sole aim of his legislation was primarily to ensure a well-subdued *ra'iyya.* That was basically a one-way contract—from the sultan to his subjects. But unless we assume the traditional *bay'a* as the only evidence of reciprocity in this system, there are no signs of a genuine covenant. If covenant there was, it should have primarily been constructed *within* "society" itself—among its subjects as individuals—rather than as an order stemming from outside.

One can, however, speak of a *politics of adjudication,* which, in turn, might be enlightening in terms of a broader polity between the imperial center, the regional nobilities and bureaucracies, and the provinces and their populations. We can assume, as we did, that adjudication was neither controlled from the "outside" through a subordination to a bureaucratic "center" whose legal powers would have imposed a procedural hierarchy among various judicial instances; neither was it internally controlled through a set of systematized or "axiomatized" structures of codified rules that would have ensured a deductive method of legal reasoning. The courts were thus overall left totally non-subordinate to any centralized communicative system. (Such an attempt of subordination came in effect much later, with the second reforms and their *niẓāmī* courts.)

The juristic typology, inadequate as it might have been, nevertheless provided the courts with a broad problem-solving framework. All kinds of regional norms were thus both *recognized* and *adjudicated* through those courts and the activities of scholars associated with them. The consolidation of regional and kin-oriented norms was thus only done at the expense of what might have become higher abstract values promoted by the imperial center.

When the majlis' texts kept repeating, at each juncture, that the well-being of the *ra'āyā* was their primary concern, they were no more than rehearsing that old guardianship discourse—one representing the sultan as a guardian-shepherd, with no clear notion as to what the *ra'iyya'*s rights might have been. A representational *modus operandi* that would have pointed to the nature of such a representation was never satisfactorily worked out either (see Chapter 2 *supra*). If political domination amounted to a blunt one-way process, the judiciary was by and large a consensual enterprise centered around the "community." So the majlis decisions should be looked upon as actions with political and legal implications, but with no specific legislation. As the above cases show, the majlis had to confront first and foremost the crucial issue of rural labor: peasants were complaining about their own labor conditions; that of course included the price of labor and its value. The majlis, however, had

to rule over labor conflicts while the great majority of the peasantry was not even linked to its masters (i.e., the state or any other party) by any form of labor contract. The common ground to all those petitions were the mīrī dues, either in cash or kind, but that was like bargaining the value of the "rent" in a contract in which the lessee/employee was left with no guarantees at all, and where his rights remained up in the air. That was one of the reasons why the sharī'a courts could not have possibly handled such cases: in the absence of well defined contracts and their correlative opinions and procedures, judges would have been unable to adjudicate. But the absence of a well defined framework for contracts and obligations in rural labor, however, did not seem to have obstructed the work of the majlis at all. To the contrary, the majlis was at home in much of its adjudication, and the reason could well be that it worked with the notion that *politics came first, and then the law.*

In fact, when the majlis decided that the *shaddād,* who submitted his own petition (C 9-7), could pay the mīrī, like the rest of the villagers, in two installments; that his payments should be kept separate from the rest to avoid the *wāsiṭa* of the villagers; that the Damascene *shaddādūn* were subjected to the *dhakhāyir* only, thus forgoing all other supplementary taxes, all such measures were based more on a combination of political privileges and customary practices than on law as such. The majlis, from one case to the next, reestablished the matter-of-factness of political privileges and custom. Consider the preceding case (C 9-6), that of the waqf al-Ḥaramayn, and the majlis' ruling: it ruled that all mīrī dues should be paid on time for the current year only, while the unpaid dues of the preceding years could be delayed in several late installments. Thus, the decision to be lenient, and to avoid force (as with the Ḥarfūshes), was more political than legal: it primarily avoided placing more pressure on an already ruined locality; and peasants petitioned the majlis for such a leniency rather than for their "legal rights." For one thing, since they did not enjoy any of those rights, they were left with demands on a case-by-case basis.

In fact, unlike the sharī'a courts which did arbitrate only by fitting each case into a broader formula so as to render the process of adjudication predictable, the majlis, which adjudged for the most part on a case-by-case basis and with a much richer array of litigations, exercised the privilege of having the unique power to disappoint the expectations of the disputants. To be sure, not all the majlis cases were "hard" with possible unexpected rulings; some were indeed based on a specific legislation (C 11-15 *infra,* which was based on an unspecified penal qānūnnāme), while others were quite predictable (a pattern adjusting to delays in mīrī installments). Generally speaking, legal texts helped in delimiting what a "case" ought to be all about, with such a framing helping to make the process of adjudication more conspicuous. The majority of the

peasants, however, were not protected by any contracts or obligations; that in itself should have rendered the arbitration over their conflicts legally very difficult, if not impossible. The majlis, however, was not expected to adjudge on a legal basis only—that would have been impossible—even though its primary function was legal. It therefore withdrew, at times, into politics-as-usual, namely, maintaining all privileges and hierarchies, and ensuring the prime importance of the *amwāl amīriyya,* among others. In so doing, the majlis pushed aside and marginalized the legal side of some crucial hard cases; but in so doing, it simply postponed for the decades to come the major issue of a politically and legally protected society.

To be sure, and in the absence of a contractual legal framework for the bulk of the peasantry, the majlis acted as a protective device. In the last two cases (C 9-6 & 9-7), the peasants of the waqf al-Ḥaramayn were given the opportunity to delay their unpaid dues of the previous years; the sharecropper in the other case was also allowed to pay his dues in two installments rather than three, in addition to receiving a recognition for his privileges (autonomous method of payment without intermediaries, less taxes, etc.). So the majlis protected some of the peasantry by lowering penalties, increasing the number of installments, granting privileges, or acknowledging older ones, among others, but it did also declare war against unruly multazims (the Ḥarfūshes, for example); all that was definitely decided on a case-by-case basis with more of a political than legal framework. In fact, with the majority of the peasantry under corvée labor, no bottom line was presumed anymore, while attempting to define "what should be left" with the peasants for their survival and production was the object of casual rulings which could hardly be perceived as modifying the status of that peasantry and its lands for that matter.

Consider the example of a farm whose water canal turned out to be the incisive point in a case forwarded to the majlis **[C 9-8]**. According to the defterdār, the farm, located in the village of Mīdaʿā, had to pay the mīrī a yearly lump sum (*maqṭūʿ*) of 3,000 piasters, whether the villagers worked on it or not: in other words, *maqṭūʿ* arrangements were a form of contract irrespective of the produce; the land could have produced a lot, or very little, or nothing at all, and yet the lump sum would still have been the same under any circumstances. Overall, such arrangements were an indication of a declared privilege, under the assumption that the locality in question and its farmers must have been doing well, were probably better skilled than average, and for this deserved to have their special arrangements kept as they were (similar in some ways to *iqṭāʿ* assignments in that a lump sum was the major requirement).[52]

52. Majlis Wilāyet Dimashq, 24-25/46/4 Dhul-Qaʿdah 1260 (November 15, 1844).

That was the defeterdār's own version, but, according to the majlis, the peasants enjoyed full possession over the farm based on a lease (contract?) (*bi-wajh al-ījār:* for the purpose of leasing) from a certain Nūrī Bek, and when their lease ended in 1258/1842, and they ceased their labor (*raf' yad*) based on a document from his excellency Najīb Pasha, it was leased by another person who never made use of it and left it uncultivated. Because of this, the majlis was convinced that the peasants did not owe any mīrī for the last two years. However, one issue was left hanging—that of a water canal[53] that irrigated the farm and whose source was independent of the water in the rest of the village. Indeed, water canals, like land, paid their own mīrī independently from the lands which they irrigated; and for Ḥanafīs, they followed the same land classifications of 'ushr and kharāj. But, in that case, it turned out that, because the land remained unlabored for two years, the water canal had been damaged. A committee, composed of a dozen elders from surrounding villages was formed, who checked the status of the canal, then confirmed that it was damaged.

"Based on justice and the essence [*uṣūl*] of the Tanẓīmāt," the majlis cleared the peasants from any dues, and then commended that the farm be reassigned to them, as was the case before, because the new tenant did not make any use of it, and that was in itself "damaging to the mīrī." Clearly such generous decisions confirm what I described earlier as a certain protectionism towards some of the peasantry: it thus cleared the peasants from their regular yearly dues simply because the land was rented (or assigned?) to someone else; and, as with all previous cases, this one too—despite its simplicity—could not have in principle fallen within the jurisdiction of the sharī'a courts. It remains uncertain whether both farm and village were milk or mīrī. (Waqf had been ruled out because that was usually, though not always, the only category made explicit.) The farmers had rented the farm from Nūrī Bek; they were thus paying him an *ujra,* and, in addition, paid a mīrī lump sum of 3,000 piasters (defined either as *maqṭū'* or *qasam*) to the treasury; in other words, the system was an exact opposite to the ones favored by Ḥanafī jurists since the tenant-farmers had to pay on their own both rent and taxes.[54] All these facts do suggest that the property was probably the property of Nūrī Bek, or even possibly that of another unknown landowner, with Nūrī Bek as its original lessee, then sublet in turn by the latter to the peasants for a higher rent. But if the property was not

53. Referred to as *qināyah* instead of the more correct *qanāh.*

54. Ibn 'Ābidīn pointed out that waqf rents, among others, were so low (since when?) that it was unfair to request the payment of taxes from their beneficiaries (or landowners for that matter). The same seems to have applied for milk properties.

milk, then the only remaining alternative was that it belonged to the treasury, and assigned as *maqṭū'* to Nūrī Bek; the latter leased it to the peasants on an annual basis, while the required lump sum went directly to the treasury. This seems the most likely arrangement especially since, when the peasants closed their lease (described as *raf' yad*), an official order (*buyuraldı,* or *amrnāme*) was drafted: such a step would have been unthinkable had the land been milk. Moreover, the decision of the majlis, favoring a return of the peasants, would also have been unlikely for a privately owned land. Even though the rent payer in the last two years was an *a'yān,* the majlis favored reassigning the peasants in that same location so that mīrī dues could flow back again to the treasury.

The case thus confirms the well established division between the jurisdictions of the majlis and that of the courts, a division that points once more to the political nature of the majlis' rulings—and in contrast to the courts, which limited themselves to private transactions, contracts, and litigations. All this should lead us to our main point: that every entity that was state property—in particular rural lands—was under a legal jurisdiction—primarily through the regional councils—dominated by political interests, whose rulings followed a different logic altogether from the sharī'a courts. References to canon law were unnecessary, and the state fiscal interests were granted a top priority; moreover, majlis cases did not follow the formula pattern of the sharī'a courts, and their outcome was less predictable. The implications of such a division are enormous. First, the system operated within a dividing line between private and public jurisdictions in a way very different from modern law: public jurisdiction (public law could hardly be used in this context) protected the happy few who received their privileges directly from the sultan, his bureaucracy, and local influential networks; in other words, it was not a domain for the public good. Second, "private communal law" was under the auspices of the sharī'a courts, the jurists, and muftīs, and was tied to a long tradition of recognition and adjudication between opinions. With that kind of separation, one can better understand the complete standing of irreverence that jurists traditionally kept towards sultanic ordinances and the entire domain of public jurisdiction. Jurists became even suspicious of judges because they were state appointees. Finally, third, the two jurisdictions did not connect much because they did not have much in common. In fact, even though they were not necessarily antagonistic to one another, they nevertheless operated quite differently, with distinct grammars, interests and arbitration procedures. Thus, while the courts imposed strict procedures and heavily relied on the jurists' opinions and muftīs' fatwās, the majālis and dīwāns were a much more informal and politicized work-in-progress. It is even doubtful whether they relied on any systematic legislation at all (sultanic legislation also aimed in principle the jurisdiction of the sharī'a courts).

When courts and councils met

Cases do get a bit more interesting whenever the two jurisdictions of the courts and councils seem so close to one another: for example, situations involving minors, debts, or conflicts between beneficiaries, or property rehabilitation, are all a reminder of what the sharī'a courts did best. So how why did some of those cases fall within the majlis' jurisdiction? And how similar were they to the ones already encountered in the sharī'a courts?

The situation **[C 9-9]** of a waqf administrator, Zaynab bt. 'Alī Aghā al-Turjmān, from an *a'yān* family, came as an entry in the minutes of the majlis on January 3, 1845, when she first filed a petition that was followed shortly thereafter by a court document (*ḥujja*) that she submitted at the request of the majlis.[55] The two events, petition and *ḥujja,* show how the two jurisdictions did articulate at times and needed each other's rulings. In fact, the administrator, who had "inherited"[56] her position from her father over a waqf that was not theirs but to which she was also linked as a lessee,[57] disclosed, during her first encounter with the majlis, three sets of documents: a firman, a *buyuraldı* (a form of ordinance), and the *ḥujja*—all three were supposed to provide evidence for her case. However, copies of the originals were not included in the majlis minutes, hence all reference to those texts necessarily relies upon the council's own presentation. The administrator had originally requested that a group of ten farmers, from a village in Ḥūrān, included in the waqf (whose properties did not belong either to the administrator or her family), be exempted from the regular state taxes.[58] In the *buyuraldı,* an argument was put forward that the village be exempted from all payments, dues, and taxes, based on several decrees from past wālīs; a petition was then forwared to the Sublime Porte, explaining how the villagers that occupied the land only a few years ago, had left, and lately a group of ten households (*buyūt*) had returned. However, once those villagers moved back, they were requested to pay taxes (*amwāl*).[59] A reply came from the Porte specifying that as long as those villagers were not landowners (*aṣḥāb amlāk wa arāḍī*) and neither possessed nor enjoyed rights over the *manāfi'* (*laysa lahum wajh tamattu'*),[60] they should therefore not be

55. There might have been an earlier entry in another non-conserved register.

56. In Arabic: *muttaṣila lahā min abīhā,* that was connected—"transferred"—to her from her father.

57. The combination of administrator-lessee was not that common in waqfs.

58. Majlis Wilāyet Dimashq, 81-82/114/23 Dhul-Ḥijja 1260 (January 3, 1845).

59. Those were properly speaking a "rent."

60. The majlis clarified that a peasant's *tamattu'* ("enjoy a right over something") consisted of the following: *mashadd maskeh,* plantations (*ghirās*), and buildings (*binā'*); all could have been sold separately from the land and were considered under sharī'a law as *tamlīk manāfi'*.

taxed on anything. The *buyuraldı* concluded with a note that since the non-ownership of the ten peasants had been confirmed, they should then be cleared of all taxes. The majlis favorably approved that decision. The question then arises as to what made those peasants so unique. Considering that practically all peasants that signed petitions to the majlis did not own their lands, but only enjoyed a *taṣarruf*-right, and even such a right was left implicit with no clearly fixed contractual framework, why did they have to submit for the most part large rents—which the texts euphemistically referred to as "taxes"—to the treasury? And why were the peasants in our last case (C 9-8) exonerated from such duties? Who paid the "taxes" then: Was it the administrator herself? Most probably, the waqf in question did not pay any "taxes" in toto, while the administrator paid herself her rent to the beneficiaries. In principle, among Ḥanafīs, the tax was indexed on the rent received by the beneficiaries and was paid by the latter. But in Ottoman times, waqfs having suffered from exceedingly low rents, "taxes" were de facto either the peasantry's burden, or at best partially paid by the lessee. So, in this last case, the exoneration must be perceived as a political privilege: the administrator-lessee used and abused of her status so that her peasants could stop all tax-payments; she would then share their produce based on some kind of sharecropping arrangement (not revealed in the documentation). In short, in all likelihood, by securing that her peasants be exonerated from taxes, the administrator-lessee received a better share of the produce for herself.

As to the court's *ḥujja,* a copy was passed to the majlis less than two weeks after the original petition.[61] It basically consisted of a sharī'a court lawsuit in which the plaintiff was a certain Ismā'īl Aghā b. 'Abdul-Fattāḥ Efendi al-Ja'farī, in addition to representing himself, was also the representative of his own sister and his nephew's son (a minor): all of them had in common, as beneficiaries, their grandfather's waqf. On the side of the defense was Zaynab al-Turjmān herself and her representative. The plaintiff began his case with a description of the waqf and its location, its lands and farm (all localized, as required by sharī'a law, in terms of their surrounding properties). He then pointed out that "since the land of the village, its farm, and their waters are all included in the waqf, the constructed areas and the building [process], the two sections [*duffatay*] of the village and farm should therefore all be included [in the waqf]; but the client of the defendant's representative illegally opposes [their inclusion] in the waqf."

61. Majlis Wilāyet Dimashq, 97/132/5 Muḥarram 1261 (January 14, 1845). The scribe added "number 88" to the title of the *ḥujja,* but it is not clear what the number refers to. The court's document seems to be quoted verbatim from the original.

In his reply, the defendant's representative acknowledged the validity of the waqf as described by his opponent, but he denied that all things "added" to the properties were owned by the waqf; he rather claimed that they were solely owned by his client. He thus pointed out that the plaintiff, his sister, and his deceased nephew, all gave their formal consent to his client "so that she would be able to build, rehabilitate, and proceed in the construction of the two sections of the village and farm; that whatever she builds will be her own property. That was confirmed in the tenancy contract [*ḥujjat al-tawājir*][62] and the permission [*udhn*] drafted in a sharī'a court, which included the tenancy contract and the approval to build and construct—an approval limited to the administrators of the waqf. All that was fully approved by a Shāfi'ī judge, and then confirmed by a [Ḥanafī] deputy judge in Damascus in 1252 [1836]." Then followed the usual court rituals of denying, requesting evidence, and finally accepting the defendant's claim. But when the plaintiff requested from his opponent to end (*qal'*) the tenancy contract, the judge reminded him that the representative's client did not grant him the privilege to end the contract, and that leaving things as they were was beneficial to the waqf because of the "fair rent (*ujrat al-mithl*)" that was paid to the beneficiaries.

The *ḥujja* thus established that what was "added" to the original properties (including the *mashadd maskeh*) were the administrator's own property, and hence neither belonged to the waqf itself nor to the peasants for that matter. This case thus originated in the sharī'a courts, and consisted of a *private contract* between the beneficiaries of a waqf and a tenant, who apparently by virtue of the contract (whose text was not included among the majlis' documents) was also appointed administrator. Such an arrangement was indeed a bit strange since appointing an administrator that was already a lessee either considerably empowers that person, or else could be the source of a conflict of interest. The two documents included as evidence among the minutes of the majlis do not specify the period for that arrangement—normally for three years only, and subject to renewal after consent of both parties—but the approval of the original tenancy contract by a Shāfi'ī judge does suggest that the legally accepted three-year period was extended (no time framework was specified in our two documents). The contract was to be followed by a *private litigation,* which, once more, established the tenant-administrator's rights and privileges. Both the contract and litigation, being as they were between two private parties, were kept within the confines of the sharī'a courts.

Even though that remained unspecified in the two documents (but other texts might have existed, which were not divulged at the majlis), the *māl mīrī* to be paid to the treasury as "tax" should have nevertheless been cleared by

62. *Tawājir,* from *ujra,* was one of those commonly used colloquial words in the courts.

the tenant herself: that at least became the customary norm, according to Ibn ʿĀbidīn, because the rents were too low—a solution discouraged by the jurists, but which they had to accept on a de facto basis. In practice, however, the mīrī ended up being submitted by the peasants working for the tenant (the peasants were, in turn, the administrator's tenants). But apparently, the administrator, empowered by her *ashrāf* origins and status, managed a total exemption from the *māl mīrī*—a way to keep as much of the revenues in her own pocket—so that neither her nor her peasants would pay any mīrī. That was the point of the whole case: granting such privileges—the tax exemption—was a political matter (as were *iqṭāʿ* assignments, among others), and the case naturally spun out of the control of the sharīʿa courts and ended up at the majlis—an institution that granted privileges. The majlis did nothing more but compare texts in order to confirm the peasants' exemption from taxes. That did not require that complex a ruling.

Besides showing the intricacies between the two jurisdictions—the courts and the majlis—the case points to contractual forms already encountered earlier. In fact, the privileges granted to the administrator in the original tenancy contract were like a legally approved *marṣad* pushed to its extreme.[63] As a reminder, the *marṣad* consisted of additions to the original property, not agreed upon in the tenancy contract, but which the tenant later acknowledged as having made "for the sole benefit of the waqf." In order to legalize those additions (usually rehabilitations of old properties), the waqf's administrator files a lawsuit in court against his tenant, denying that he ever approved any alterations to the property. In his response, the tenant-defendant would specify the sum that she had invested in the property, which later, once a ruling comes in her favor, would become the *marṣad* that the waqf owes to the tenant. The waqf should therefore refund the tenant her *marṣad* prior to closing any contract. In short, the tenant would secure a long lease that would go far beyond the legally accepted three years, while a generation of beneficiaries would receive a quasi-deposit, if not in cash then at least in the tenant's investment itself.

In the above case, the *marṣad* was already secured in the original tenancy contract. In fact, the text explicitly recognized the administrator-tenant's right to build, construct, renovate, and restore damaged constructions; in addition, she would also own the *mashadd maskeh* of the lands. All of them were investments that "belonged"—in the form of a deposit—to the tenant rather than to the waqf, and even though they were not legally a *marṣad per se* (since even though the latter was a deposit in the form of an investment, the property and its added value still belonged to the waqf, and the *marṣad* was technically only a form of "debt"), nevertheless came close to it since the administrator

63. On the *marṣad,* see supra Chapter 3.

ensured her tenancy rights for a long period of time: the beneficiaries will have to reimburse her all those extras in order to free the waqf.

The whole arrangement was therefore legalized on the basis that the tenant was paying a "fair rent," that is, "fair" to the waqf. But since "rent" in that system was neither linked to labor, wage, price, nor tax, there was no way its "real value" could be determined. The notion of "fair rent" was therefore a construction that pointed to the *consensual* side of the tenancy contract: the price was just simply because both parties accepted it.[64] Thus, ironically, the notion of "fair rent" became a tool to conceal what was "unfair"—namely, that rents were too low precisely because the mīrī was exacerbating and unjust. Ḥanafī jurists argued that such unfair practices had to be accepted on the de facto norm of custom.[65] Our last case (C 9-9) was therefore, on the one hand, typical in that the administrator-tenant secured a low "fair rent" in return for an investment-deposit (usually defined as *marṣad*), but, on the other hand, was uncommon in that the roles of administrator and lessee coalesced into one, thus giving the administrator supreme power, while her peasants were exempted from the mīrī. Needless to say, the administrator worked out for herself the best deal possible. However, that would have been impossible without that extra step—the majlis' arbitration and its approval of the sultanic and similar official "orders"—which the sharī'a courts could not have possibly secured for her on their own. The case, which moved back and forth between a sharī'a court and the regional council in Damascus, points clearly to the borderline between the two jurisdictions. First, the majlis was indeed an "extension" to the jurisdiction of the sharī'a courts in the sense that it could bypass all the latter's limitations. Second, the majlis had to acknowledge Ḥanafī practice and its applicability within the sphere of the sharī'a courts. But the majlis' own source of legislation, however, was far from clear. To be sure, the basis for its adjudication was a broad spectrum of "sultanic legislation," but that was an even more confusing and piecemeal set of "codes" than Ḥanafism itself.

The confusing nature of the majlis' arbitration is even more visible in a few of the "hard" cases analyzed in this chapter, which points to another essential aspect—that of the borderline between "politics" and the "law." Destined to be primarily a "legal extension" to the sharī'a courts, the majlis only effectively operated—in particular when confronted with non-routinized hard cases—while transitioning from the legal to the political.

The Ottoman bureaucracy, besides adopting Ḥanafism as its main tradition, had also acknowledged the validity of both other Muslim and non-Muslim legal traditions that were crucial for the perseverance of autonomous

64. On the notion of "fair rent," see Chapter 3.

65. See Chapter 1.

socials groups, or the *millet*s. But that, in turn, proved insufficient due to the limitations inherent in Ḥanafism itself, and a parallel system of legislation and adjudication had to be created, mainly in the form of qānūnnāme. Ḥanafism had to validate and integrate within its own corpus a number of regionally efficient customary practices, but their integration, however, did not contribute to any structural change within that system. To be sure, even though such intricate arrangements did establish, with significant time and regional variations, an overall bureaucratic efficiency that went well with the nature of these societies, its failure to create a more coherent, rational, and valid system did exact a heavy toll on their historical progress. By the nineteenth century, the number of self-correcting practices, or contracts simulated as fictitious litigations, and the de facto accepted customary practices, not to mention a growing number of hastily dispatched sultanic edicts, all grew to such proportions that a structural effort to rethink the system globally became more than necessary. The Majalla was part of such an effort, and even though it established itself as a quasi-"civil code," much more was needed, and the bulk of legal reforms were promulgated in extremis as copies of the French Napoleonic codes. In short, the system did not reform from within, but had rather implemented upon itself a totally different rationale to what was considered legal was in those societies.

Covering an episode from an early majlis of the Tanẓīmāt reveals a legal system that, in its last decade or so, prior to major western spirited reforms that totally revamped it, trying at the same time to reform itself while still applying old obsolete notions which, in the final analysis, brought the system down. If we assume that the primary aim of the institutionalization of the regional councils—at least of the early reforms (the 1840s)—was to create a parallel system of adjudication to the sharī'a courts due to the latter's intrinsic limitations, then the majālis were in turn hampered by precisely the same type of problems that effectively limited Ḥanafism. To begin with, the latter, despite all claims for "universality" and its ability to accommodate many Muslim and non-Muslim "marginal communities," remained nevertheless for the most part a "community law" taking care of private disputes within a locality. It thus fell short of providing a multi-ethnic empire with a well grounded "public judiciary" that would have accelerated the changing socio-economic practices, on the one hand, and created alternative procedures for such areas as land, rent, taxation, torts and crimes, on the other. Hence, the necessity of the regional councils. The latter, however, having mostly adjudicated on less clearly defined legislative grounds, had to politicize many of their "hard" cases. To be sure, since the land tenure system of the empire consisted of a political distribution of revenues, a separation of powers between the judicial and political was not a purely legal matter. Ottoman societies, in all their

variations, had eventually to struggle, beginning with the second half of the nineteenth century, with the dual process of liberalizing their economies and democratizing politics. The judiciary, in turn, becomes an effective system of arbitration the more it frees itself from politics.

Chapter 10

Hanafi practice and sultanic ordinances: Which normative rules did finally prevail?

In all the adjudicative practices encountered thus far, whether in the form of individual chapters, sections, or epistles in the fiqh manuals, or fatwās, or the adjudication of the sharī'a courts, a process had begun to unravel. Opinions were always selected from a handful of authoritative sources from the madhhab, based upon their need for a specific purpose. Those opinions were typically decontextualized from their original sources, as there was no effort deployed to understand an opinion in the context of its text of origin. What in fact provided meaning to a set of opinions was, on the one hand, their relations to one another, and the assessment that they are able to provide on the specific matter they were chosen for, on the other. In other words, the aim was not to understand an author, his *œuvre,* or even a specific text of his, as much as to use one or more of his opinions in conjunction with other "similar" opinions—all with the sole purpose for adjudicating on a contemporary issue. Opinions thus behaved like codes that scholars simply "found" suitable for a particular matter at hand; and besides their immediate usefulness, it was their association with totemic figures of the past that ensured their respectability.

What really mattered then was less the body of textual evidence itself, and more how those texts were grouped together and interpreted, and how their meaning, through analogical reasoning, was associated with the case in question (or a *ḥāditha,* in the jargon of the fiqh). In fact, the diverse body of opinions, having been selected from a variety of texts, all were from within the Ḥanafī juristic typology, hence from different authors, localities, and historical periods, were all quoted ad hoc, and then by means of analogy brought together in relation to one another and applied to a contemporary case.

For each period (or generation), scholars, whether jurists, judges, or muftīs, worked out methods that redefined the practice of their madhhab in terms of opinion-finding, interpretation, rules of analogy, and rules of custom recognition. In short, they redefined all the idioms of their school so as to adapt

them to newly emerging societal conditions. In this process, the major notions of both civil and criminal law, such as contract, property, rent, taxation, and crime, might be amended, with clauses and fatwās added, so as to adapt them to contemporary needs.

Overall, the nature of change in Ḥanafism is very much incremental rather than structural or evolutionary. In fact, the various practices that emerge for each period, were in principle contingent on so many variables that it would be hard to predict outcomes to specific cases. Yet, the Ottoman judiciary, by any standard, was not such an open system so as to generate drastic changes. Besides the interpretive strategies outlined above, the "general rules (*al-qawā'id al-kulliya*)" of late Ḥanafism, as enunciated first by Ibn Nujaym and later reenacted by the Majalla, acted as metaphorical elements of legal doctrine whose effect could be perceived at several interrelated levels. Moreover, judges, despite their discretionary powers, were subject to enormous constraints when it came to ruling on hard cases, while the bulk of sharī'a cases routinized to such a point that nothing unpredictable would come out of them. Finally, the judiciary apparatus was the exact opposite of a well behaved bureaucratic institution since anything from teaching, transmission of knowledge, and adjudication were all conducted on a person-to-person basis, all of which contributed to keeping such institutions within the realm of the predictable.

It would have been difficult for that system and the type of practices that it generated to assume all the judiciary functions of the Ottoman Empire. For one thing, it was much too rooted in an old idiomatic language that was not always effective despite some efforts of adaptation. For another, new laws and regulations were needed for which the fiqh had no particular answer. That is why sultanic legislation was a de facto system that was kept parallel to the sharī'a, and which behaved with its own grammars, methods, and assumptions.

Our concern in this chapter is centered on texts that could be grouped together under the label of "sultanic legislation"—firmans, decrees, *dustūr*s, laws and regulations, etc., which altogether represent a different method of drafting texts and interpreting them. Freed from the Ḥanafī tradition, the sultanic corpus of texts, thanks to the authority of the sultan, moved more freely and with different idioms than sharī'a practice.

The Ottoman legal system is known to have instituted and made official the distinction between Ḥanafī practice and the qānūn. The former evolved following the complex heritage of its own line of scholars. Ḥanafism implied a judicial decision-making process at different levels. Such a process had its own rules, hierarchies, and a method of adjudication that followed, *mutatis mutandis,* what had already been established in the Ḥanafī school by the fifth/eleventh century: adjudication was between opinions and their common

principles and differences rather than between various interpretations of Prophetic practice (the sunna) as it had been in the previous centuries.[1]

Ijtihād, therefore, pushed the system away from stagnation, but that in itself was not enough since it kept the opinion-making process locked into layers of past opinions, however unsuitable those might have been. In fact, an opinion that was the outcome of *ijtihād* had to be constructed on the basis of analogy with older opinions and in conformity with well established principles. To break this hermeneutical circle of opinion-making, jurists had to accept the notion that at least some of the customary practices ought to be recognized either through specific rules of recognition, or else on an ad hoc basis, that is, without necessarily following the fundamental rules of analogy, interpretive reasoning, or even consensus among the opinions of the madhhab. Ḥanafism functioned overall autonomously on its own without much intervention from non-religious officials.

At a different level, "secular" laws were drafted. By the sixteenth century, the sets of non-religious and regional laws were known as the qānūnnāme, a practice to be continued in the following century, but by the eighteenth and nineteenth centuries, the drafting of systematic qānūnnāme had already given way to a more confusing set of laws, rules, and regulations, referred to under different names such as sultanic orders (*awāmir sulṭāniyya*), firmans, edicts, and laws (*dustūr*s). In nineteenth-century Beirut, copies of some of those texts were kept in the sharī'a court registers themselves (this custom was not followed in Damascus where newly received "orders" were left in separate registers) as if to keep judges reminded of new regulations imposed at the margin of Ḥanafī practice. Even though the subject matter of those new regulations was fundamental in every respect—from conscription to court fees and land tenure—it is not clear though whether judges effectively took account of anything that came to them as "new regulations." For one thing, the two worlds of sultanic decrees and Ḥanafī practice were indeed very different in terms of scope, grammar, and syntax. For another, the subject matters were very different so that each set of laws worked for a particular jurisdiction. Thus, sharī'a courts typically neither handled conscription matters nor high interest rates for that matter: those were under the jurisdiction of the regional

1. Brannon M. Wheeler, *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship* (Albany: State University of New York Press, 1996), 115: "The canonical authority previously attached to the Qur'ān and sunnah was extended to include a corpus of opinions selected from certain second century local authorities. The opinions had been in wide circulation since at least the middle of the third century, the object of scholarship designed to demonstrate that the opinions were consistent with the sunnah. In the fifth century, however, the opinions were "canonized" in the sense that they, rather than the sunnah or Qur'ān, became the primary focus of classical fiqh scholarship. Like the revelation and the sunnah before, the opinions were conceived of as a textual corpus."

councils. Why then include texts in court registers aimed at a different kind of practice in the first place?[2]

In Beirut, new firmans were inserted between cases as if they were cases all by themselves, in an apparent effort to render sultanic legislation *visible* to the courts. But considering the limited jurisdiction of the courts, what was the aim of such a visibility? I am particularly interested in the *visibility* that was intended for a set of texts, with very little relation to one another, and juxtaposed in the court registers, as soon as they were received from Istanbul, side-by-side to other court cases, even though they seem to have had very little impact, if at all, on the procedures of the courts themselves. The original texts were usually in Ottoman Turkish, followed by an Arabic translation, but at times, the text was either in Turkish or Arabic without the presence of the other mirror-text. Yet, despite this textual juxtaposition between sultanic regulations and sharī'a cases—to the point that sultanic decrees often did not even start at the beginning of a new page—they nevertheless shared but very little in their respective grammars. In fact, sultanic decrees were drafted in a *perlocutionary* style: orders, threats, demands, and the like. They neither shared the multi-level structure of the sharī'a cases and the shifts between a first- and third-person speaker that were common to them, nor the Ḥanafī adjudicative procedures for that matter. Indeed, sharī'a courts had to construct for each case a text that would handle the multi-level personalities involved in the litigation: plaintiff and defendant, their representatives and witnesses, the muftī's fatwā, not to forget the judge himself who, even though he was the sole creator of a case's textuality, managed to fit himself into a language of authority by distancing himself in the third person.

Sultanic texts were not in need of such elaborate shifts and twists as they were drafted on the assumption that they be applied as soon as possible. Addressed to an anonymous body of rulers, judges, officials, and *ra'iyya,* the text of a sultanic decree seldom proceeds with the "I" form (or "we" for that matter), even though the speaker is supposed to be no one else but the sultan himself. It rather opts extensively for "our," or the possessive form for "we": our laws, our lands, our army, etc., so that used as a modifier before a noun, "our" gives the impression that all possessions and institutions are collective—possessed by some kind of collective spirit—and hence framing and applying the law enhances such a spirit.

2. That applied to Beirut only. Damascus and Aleppo had separate registers for their sultanic orders (*awāmir sulṭāniyya*) even though the latter were not exclusive to new legislative acts and there must have been other regulations kept somewhere else. The only register accounting for the minutes of the Damascus majlis in 1844-5 does contain some newly drafted regulations of the early Tanẓīmāt era.

[C 10-1] In a sultanic firman on conscription addressed to the people of Beirut by the middle of 1850,[3] the addressees are referred to either as "the people (*al-jumhūr*)," or as "you, who are addressed (*antum ayyuhā al-mukhāṭabūn*)." The second mode of addressing in particular has a perlocutionary force that is at the same time threatening and comforting in the order it attempts to impose: "So, you—the addressees—you should gather in one place with all those who should also be there, as stated in the aforementioned law." Such statements were drafted either with an explicit message: "you should do so-and-so, otherwise you'll be punished in such-and-such manner," or else the threat was hidden and concealed early on in the statement: "you should do so-and-so, otherwise you know what kind of punishment will follow." In most cases, punishments were not detailed and deliberately left vague and obscure: this is because misdemeanors against "public laws" were not usually brought to court, whether the sharī'a courts or any of the newly established courts of the Tanẓīmāt.

Surprisingly, the full one-page text of the sultanic firman was in Arabic with no accompanying Turkish text as was usually the case; and its subject matter was conscription. According to the document, all young men (*futyān*), ages twenty to twenty-five, could be subject to conscription: they were to be solely chosen by lot, and the title of the document made that explicit: "A copy of an exalted firman in the right of lot (*ḥaqq al-qur'a*)." The "right of lot" was meant to be ambiguous: Was it referring to the state authorities' right in choosing conscripts by lot? Or did the potential conscripts themselves enjoy the right to be chosen by lot, that is, no full and systematic conscription was required but only a partial one? In other words, it needs to be known whose right was it, the state or the conscripts? The tone of the document seems to suggest that it was the state's right to draw lots on potential conscripts, and that the event ought to be fully publicized (the inclusion of a copy, *ṣūra,* between sharī'a court cases was probably meant more as a device for publicizing an event rather than, say, a legal tool intended for judges) so as to take place only once a year in order to select forty-eight individuals (*nafar*s) from Beirut itself.

Interestingly, the notion of the "individual" *nafar* became an important tool for the Ottoman authorities as early as the first modern census of 1831-38 primarily for taxation and conscription purposes; but other motives played a role as well, such as the special status accorded to "minority" groups (Christians and Armenians in particular) and the explosion of "nationalist" movements in Greece and the Balkan regions, while "minority" groups became the object of special concessions between the Porte and some European powers (British,

3. Beirut sharī'a courts, unnumbered register, p. 134, end of Rajab 1266 (May-June 1850).

French, and Russian). Such concerns, among others, led to the first incomplete census of 1831-38, followed by another incomplete one in 1844, and another incomplete third in 1866-73; thus, it is only in the fourth and last census of the nineteenth century, completed between 1881/82 and 1893, that a more comprehensive picture emerges.[4] What is of interest here is that right from their first census, the Ottomans adopted a new approach that designated the male subjects as their primary target; in other words, and despite the incomplete and fragmentary character of that census, a conceptual shift took place between the traditional "household" notion designed solely for taxation purposes, such as the *khāne,* and the more modern notion of the individual subject. The subjects of the empire were indeed targeted as individuals whose total number ought to be known in terms of regional, religious, linguistic, and ethnic divisions within the populations of the empire (even though the male subjects remained the exclusive targets until 1881-82, when the statistical unit became the individual itself, irrespective of sex).[5]

As to conscription, the Ottomans, having relied almost exclusively on their Janissary corps until its defeat in 1826, which as a system was highly selective, avoided a conscription based on randomly or systematically recruiting males from all the empire's populations since the purpose was precisely to avoid a military integrated with locals. The 1850 firman, in a way similar to all nineteenth-century censuses, was therefore part of a new policy that began to target local populations in creating a newly reformed military. During the Egyptian occupation of Greater Syria (1831-1840), the peasants were the repeated targets of the military authorities for conscription purposes, and the pattern was one of general arrests in the fields, from which men were selected and driven far away from their homes to far away places.[6] With the Ottomans gaining once more their control over Syria in 1840, the pattern already established by the Egyptians had to continue, but, at least in cities, selecting all those males had to follow a more imaginative process, hence the conscription firman.

The shift therefore from kin-based households to the individual *nafs* represents a cognitive and practical transformation whose impact is visible in many official texts. Thus, even though since 1838 (date of completion of

4. Kemal Karpat, "The Ottoman Demography in the Nineteenth Century: Sources, Concepts, Methods," in J.-L. Bacqué-Grammont & Paul Dumont, eds, *Économie et sociétés dans l'Empire ottoman (Fin du XVIIIe - Début du XXe siècle),* Paris: CNRS, 1983, 207-218; Zouhair Ghazzal, *L'économie politique de Damas durant le XIXe siècle: Structures traditionnelles et capitalisme* (Damascus: Institut Français de Damas, 1993), Chapter 2.

5. Karpat, "Ottoman Demography," 215.

6. Hanna Batatu, *Syria's Peasantry, the Descendants of Its Lesser Rural Notables, and Their Politics* (Princeton: Princeton University Press, 1999), 109 (based on the John Bowring commercial report).

the first census) only the Muslim males of a certain age were targeted for conscription, the whole notion of "casting lots," that is, the *qur'a,* implied a shift from the household, kin, and community, on the one hand, to that of the individual on the other. But what the text of the firman, whose label reinforced the "right to choose by lot (*ḥaqq al-qur'a*)," indicates is that all "modern" notions based on the individual subject were, by the middle of the nineteenth century, still poorly implemented so that the text keeps hovering between those individuals *chosen at random,* and those members of a religious "minority," who, like the Christians, were not entitled to that random choice. In fact, choosing by lot implies *randomness,* arbitrary choice, and a formal equality among individuals—notions that were incongruous with and constituted a threat to the very existence of kin-based groups. Many of the official and non-official Ottoman texts, in particular during the period of reforms, manifest an ambivalence to bureaucratic and political notions based on "arbitrariness" of any kind.

Even though sharī'a court texts would seem to their "reader" not addressed to anyone in particular, they were nevertheless not drafted with "all the people" as potential addressees. Thus, the difficulty in understanding the language of such texts stems from the fact that they were drafted for *a few specific individuals, but to unlimited addressees* whose social and official status could vary greatly: in other words, those were *private* documents in the first place, and not meant to be circulated around. They were also meant to memorialize an event (*ḥāditha*), as portrayed in Ḥanafī doctrine, in order to emphasize a faithful recording of facts.

By contrast, firmans manifested an opposing tendency. First, they were not meant to keep track of an event but to inscribe the sultan's signs, reproduce them in copies (*ṣuwar*), and disseminate his legislative will throughout his empire. Thus, a firman is more at ease in addressing a collectivity—even those who are not directly implicated. In the 1850 firman whose object was both to describe a procedure for choosing conscripts by lot and to legitimize such a step, the text first addresses a limited number of high-ranking officials, then suggests that those personalities share a common responsibility in disseminating the firman's content to the population at large; and, in the final third of the document, the population of Beirut is at a direct challenge without any mediation. Such shifts are common to firmans, and the choice of addressees is closely related to the tone in each section: thus, when the tone is meant to be descriptive, it addresses the high-ranking officials specifically, but when a shift occurs between the descriptive, prescriptive, and the perlocutionary, the nature of the addressees change too.

The text, referred to both as "our firman" and "our order (*amru-nā*)," first addresses a line of high-ranking personalities: the wālī of the province of

Sidon (to which Beirut belonged), the supreme judge, and finally the majlis of Beirut. As to the text's second "descriptive" part, it also addresses itself to those same personalities by ordering them to disseminate, as soon as possible, the contents of the firman.

> Once you receive this noble sultanic signature [*al-tawqī' al-rafi' al-sulṭānī*], you should inform [the people] [*tuḥīṭū-na 'ulum-an*] that all measures [*tartīb-āt*] concerning our sultanic soldiers, whose situation has now stabilized [*istaqarrat*] thanks to the help of God, have also been reorganized [*muntaẓama*]. Each military unit [*arduwi:* contingent?] is assigned [*tukhaṣṣaṣ*] to a region of the provinces of our guarded kingdoms [*dā'ira min diyāru mamāliku-nā*]; and those who are recruited for military service remain for a five-year period only. Once this period has been completed, [the soldier/officer] will then be allowed to leave the service and receive a release notice [*tadhkarat al-iṭlāq*]. He will be able to go back to his home-place [*waṭan-ahu*] and city in order to ensure a living and work in plowing and agriculture, or any other craft or labor; he will [also] be tied [*muqayyad*] to the reserve army [*al-'askar al-radīf*] which is a general force for the Muḥammadan confession [*quwwa 'umūmah li-l-milla al-Muḥammad-iyya*].[7] Those who are dismissed [*yustakhraj-ūn:* taken out] from a military camp after completing the five-year service, will be replaced with an identical number [of candidates] from people of the same locality [*ahālī tilka al-diyār*], which has been assigned to that military unit from which young men, ages twenty to twenty-five, would be recruited by a just and legal lot.

The text limits itself thus far to a description of the process; it also explicates the reason for adopting a particular conscription method—in drawing lots. The idea of recruiting *local* conscripts by lot from the (Muslim) population was, at that time (since its implementation in 1838; 1840 for Bilād al-Shām), a new concept whose implementation proved to be difficult for two reasons: 1) the Ottoman (regular) army would be mainly constituted by conscripts from the local populations of the empire; that was a major departure from the old system of establishing special élite units, composed of *sipāhi*s and Janissaries, whose cavalrymen and officers were for the most part recruited as slaves from very specific minorities, age-groups, and provinces; and 2) that would be followed by a process of *randomization,* also new for a kin-based society officially divided into *millet*s: even though the lot drawing was to exclusively target the "Muḥammadan millet," randomizing did not match the spirit of carefully structured alliances based on kin, family, region, religious status, all of which acted as a safeguard to hierarchical solidarity.

7. The "reserve army" statement is neither associated with nor clarified by any subsequent notification. Was the "reserve army" a parallel group to the regular army and used under exceptional circumstances?

The firman promises a "stabilization" of the armed forces in the sense of the subjection of all recruits to a newly designed *niẓām* diagram of order and power within the military. The new diagram of order was probably modeled after the Egyptian experiment, which in turn followed a French disciplinary model.[8] It overall signifies a radical turn of events not only because the army would not be limited exclusively to special groups, but because of the disciplinary techniques that were required to bring together recruits from very different backgrounds.

All such factors, combined with the fact that the promulgation of new laws was not the work of an elected body of legislators, but of the sultan and his entourage, all created a hidden *essential tension* within the text. Thus, the persons and institutions to whom the firman was addressed, all of whom were elected *ex officio,* were the ones who "received" the firman for dissemination. The combination of divine and religious representations, associated with political and economic privileges, gave those *ex officio* recipients the task to propagate the sultan's signs as law. The reception of the text of the law by a narrowly defined élite provided it with its first test of legitimacy since that élite primarily functioned in transmitting, informing, and legitimizing.

In order to make itself acceptable, the text had to minimize the impact that a yearly drawing by lot would have had on the population. Everyone, emphasizes the text, within the five-year age category was to be *equally* targeted, "whether rich or poor, distinguished or humble." Religious differences were to be avoided, except on one occasion when the ambiguous category of the "reserve army" was mentioned—the "Muḥammadan millet." No mention either of kin, family hierarchies, or neighborhood networks, even though those must have posed a great challenge for the entire conscription program. In short, the firman's text avoids naming any potential resistance (as any regulatory text would do) and instead focuses on the new order of things. The new order dictates a random choice of conscripts, hence a couple of factors were crucial: randomness, the statistics of numbers, and the tabulation of all facts in specially devoted *defter*s. Randomizing the process of selecting conscripts ipso facto implied creating a new way for counting the populations on the basis of individual subjects, so that even those who were not within the specified age category were also indirectly affected by randomization: they were not anymore, from the state's point of view at least, embedded as individuals into *khāne*s and households.

> A military officer was dispatched from each unit in every qaḍā' of the regions [*diyār*] in which the unit is stationed in order to register the number of

8. Timothy Mitchell, *Colonising Egypt* (Berkeley: University of California Press, 1991).

> male individuals in a *defter mufaṣṣal.* ... Each military unit of our sultanic soldiers had previously dispatched to the Arab regions [*al-diyār al-'arabiyya*] officials [*ma'mūr-ūn*] who filled *defter*s detailing the total number of the male populace [*'adad nufūs al-ahālī al-dhukūr*] in the regions included [within the boundaries] of each qaḍā' on a separate basis. Concerning the number of counted individuals in Beirut, forty-eight *nafar*s are going to be selected...by lot. [A military officer] will be accompanied by a *'ālim* in order to test those who claim [religious] knowledge [*ṭalabat al-'ilm*],[9] and by a doctor who will decide those who do not fit for military service.

The descriptive tone, in this second part of the document, provides a concrete account on how to proceed with the lot drawing by linking the idea of a "modern" census, based on a one-to-one count of all male individuals, with a random selection of those same individuals: in other words, randomness had to be preceded by an exact count of the (male) populace. That was the novelty of the system. But even though the text is describing a newly designed project, it is still trapped in the intricacies of the *ancien régime.* Thus, the reference to the Arab regions is but another one of those old clichés that served its purpose too well in containing all ethnic and linguistic divisions within the empire, but its uncertainty during the reforms comes from the fact that the new policies were precisely meant to forgo such divisions, and which anyhow led to the exact opposite: nationalisms all over, and political movements seeking independence. Another remnant of the old regime is the religious requirement imposed on all conscripts—that they should be Muslims—even though, surprinsingly, that condition comes only once in the text, and indirectly, when the uncertain category of a "reserve army" is mentioned. But probably the most problematic notion in the document is its title: *ḥaqq al-qur'a.* Since conscription was not systematically applied to all citizens, that is, could not be viewed as "universal" in its scope, a lot drawing looked unfair at best: every year, it paralyzed the lives of forty-eight individuals for a five-year period. The lot itself was therefore the most problematic event, certainly the least convincing, and the weakest point in the chain of arguments defending the procedure, while references to the Arab and Islamic "roots" of the conscripts seem like reassurances to calm a frustrated populace. Such reassurances, however, are balanced with the threatening tone of the last passage.

9. The idea here is that, after the forty-eight individuals have been selected by lot, those among them who turn out were pursuing religious knowledge had to be excused from military service. Others will come to replace them.

> [Once the date of the lot has been fixed,] you should, you, the addressees, meet in one place with all those who must attend [all males of the required age category] as stated in the aforementioned law. You will create with the official [*ma'mūr*] a majlis [or draft board] to proceed with the lot [*ḍarb al-qur'a:* beat the lot] according to the established principles [*uṣūl*] of the law [without confederation [*bilā ḥilāf*]?].[10] You should proceed with the lot without bias or ill behavior [*inḥirāf*] [against someone]. Those who will be selected will have the opportunity to go back home and stay there for twenty days while pursuing their usual businesses and tasks. On the twentieth [of the month][11] they should go back to the same place in which the lot was drawn and from there they will be sent, with prior knowledge of an official, to the area specified for them... If anyone was chosen by lot, then allowed to go home [*waṭan:* country, nation] to take care of his business, and then runs away and never comes back in the due date, he will have the officials searching for him all over so that the earth will look small, and he will surely be captured and subjected to punishment as requested by law.

The threatening tone coincides all too well with those final and concluding statements, the only ones directly addressed to those directly concerned, namely all males of a certain age who will be directly targeted and randomly selected. While the only reassurance given is the twenty days of grace they could spend at home with their families, the five-year conscription plan must have disrupted many lives and those of their families and their labor relations. In fact, even though the number of forty-eight conscripts is not that demanding for a city like Beirut (one issue remains unsettled though: How to proceed concretely in the drawing of names? Were all names recorded based on the completed census?), it must have disrupted far more lives and annoyed many families attempting to flee the draft. As the number of draftees grew larger and larger over the years, potential conscripts attempted to create new excuses: besides the possibility of a medical handicap, or an affiliation to a religious order, an early marriage would be another excuse.

Our first sample of sultanic legislation already points to serious divergences in both the legislative and adjudicative styles between sharī'a and sultanic-based laws. Even though that is to be expected, it poses questions on how the two systems coexisted side by side, and whether they did relate at any level. The Beirut sharī'a registers for that period (1843-60) do not carry any case on conscription: Why then was a copy of the above firman kept as part of the

10. The meaning of *bilā ḥilāf* in this context is far from clear. The literal meaning of *ḥilāf* is "confederation," which does not mean much in this context; the other possibility is "association" because of the *ḥilf* root, but this, in turn, leaves the meaning suspended.

11. No month is specified: the reference could either be to the month following the lot drawing, or the month following the document's date. The first seems more probable.

courts records? One possible explanation is that the courts were indeed the main source of law and its primary space of adjudication, and that judges, even though they never handled conscription matters, would be consulted by young men and their families on the legalities of the draft. In short, the courts, even if sultanic legislation was not meant to be part of their jurisdiction, were at least responsible for disseminating its content. In fact, as I argued in Chapter 9, judicial policy making was mostly limited to the regional councils, so that a great deal of sultanic legislation must have been aimed towards the latter, without, however, ignoring the courts. Moreover, it is to be expected that the courts did use at least *some* of that legislation, even though the scope and depth of such legislation, if it did exist, remains uncertain until more research progresses in that direction.

What we know for certain, however, touches upon the very principles of sultanic legislation and its major differences with Ḥanafism. The latter was construed along a logic of reasoning and adjudication that heavily relied on canon, so that each act of *ijtihād* consisted of a method that constructed texts from a juxtaposition of older fragments, all of which were re-contextualized for the purpose of a problem-event. By contrast, sultanic firmans had obviously neither such ties to the past nor to authoritative figures, nor were they even limited to a madhhab. That explains their freer form and syntax. Thus, if the deep roots of the sharī'a courts was their main social asset, the strength of the "state" judiciary came precisely from its non-reliance on tradition, hence its ability to legislate and adjudicate on matters that Ḥanafī practice would not handle with ease. A case in point were policies that covered loans with interest, in particular if the profits of the lender were high enough to suggest usury.

Usury without name

[C 10-2] A firman, received in Beirut and dated April 1852, aimed at regulating what was thought to be excessive gains from money lending, and targeted excessive *ribā* practices without ever mentioning them by name. As in the previous firman on conscription, the *ribā* text is in Arabic and with no accompanying Turkish text, has no title, and begins with the usual list of prestigious addressees: the wālī of Sidon, the head of its respectable majlis, its defterdār, Beirut's chief judge, and finally, some judges in the same province. Since the *ribā* had to be euphemistically named, the firman only indirectly tempered the *ribā* by fixing a percentage of profit on moneylenders. The taboo appellation had to be replaced with more general names denoting profit making with no reference to usury as such: *murābiḥ-ūn* and *aṣḥāb al-tharwa*

were two of the most common euphemisms hiding the usurious activity of the moneylenders whose profit margins the firman was attempting to reduce (or at least regulate). Thus, the word *murābin* (from *ribā*) has been avoided altogether and replaced by *murābiḥ,* which derives from the root *ribḥ;* while *murābaḥa,* also from the same root, is a resale with a stated profit, or a markup contract,[12] all of which denote an activity of selling a commodity with a known profit (*ribḥ ma'lūm*), thus assuming that the sale price is indeed higher than the original one: it is as if the text is saying that some individuals are making profit (*ribḥ*) by lending money but without practicing usury, and we need to legalize that profit by fixing that profit margin. The term *aṣḥāb al-tharwa,* the wealthy, is even more neutral since it even avoids profit-making margins.

> It should be known that the profit makers [*murābiḥ-īn*] and other wealthy individuals [*aṣḥāb al-tharwa*] who lend money[13] to this and that, in particular the landowners [*aṣḥāb al-amlāk*] and the farm owners [*çiftlik*s], farmers and laborers [*ahl al-zirā'a wa-l-'umalah*],[14] accumulate enormous profits, and occupy themselves in profit making [*yashghalū al-murābaḥa*] and in adding profit to profit.[15] Then came the promulgation and announcement of our orders [*awāmir-unā*] [in a previous firman][16] covering all our protected territories, thus forcing [the moneylenders] to declare their profits on a yearly basis at an eight percent [rate] so that unlawful profits [*murābaḥa fāḥisha*] and extra gains would be brought down [to the new percentage]; and [the debt] would be reimbursed in installments [*taqāsīṭ*][17] with newly conceived receipts. That [measure] has become our general law [*niẓām 'umūmī*]. But as a result of what has been achieved, and the problems and difficulties in applying this law, it became necessary to modify it. Recently, at the higher majlis of justice [*majlis aḥkām al-'adliyya al-'ālī*], discussions and readings [of petitions] took place. The participants present in the [*'adliyya*] meetings decided that lending the money of orphans and waqfs is subject to its own regulations and its own special law. As to the money that is credited to or received as credit by villagers, farmers, and anyone else, it should be subjected to the following law: the calculation of its profit should be on the basis of five piasters for every *kīs* [500

12. Frank E. Vogel and Samuel L. Hayes III, *Islamic Law and Finance* (The Hague: Kluwer Law International, 1998), 7.

13. The text says "give money" (*yu'ṭū darāhim*), thus insinuating, even though *a'ṭa* could both mean to give and to lend, a notion of lending money.

14. *'Umalah* seems to be a colloquial word, used as a plural of *'āmil,* worker (pl. *'ummāl*). The other possibility is *'umlah,* currency, money; but this seems unlikely because of the "and" that connects farmers *and* laborers.

15. In Arabic: *murābaḥat al-murābaḥa,* or "making profit with profit."

16. This firman could not be located.

17. An incorrect use of *aqsāṭ.*

> piasters], that is, a twelve percent [interest rate] for the year.[18] And since the local merchants, as well as the European merchants, holders of special statuses [*barāwāt*], and the protégés of European powers, might have lent money based on previous contracts [*muqāwala*], their agreements and receipts, prior to the [actual] regulation, should not be taken into consideration. From now on, and as a general rule, profit-making should be no more than [the regulated] twelve percent.[19]

Money lending, at twelve percent, and with an official increase of four percent over a previously unspecified period,[20] has been legalized in the sultanic text. Does this imply that the interest gained as profit, or the amount of credited money, ought to achieve the status of a *māl mutaqawwam,* that is, that of a legally protected transaction?[21] If the answer is affirmative, then a moneylender who, a year after lending his money, was not reimbursed according to the clauses of the agreement, could file a lawsuit against his debtor and be legally protected against the latter's inability to refund. In other words, the object of the transaction itself, if legalized, becomes a *māl mutaqawwam:* but will the courts protect it as such because of the new stipulations? To be sure, such measures do represent a departure from Ḥanafī practice which never bothered into looking at margins of profit per se, but simply condemned usury globally as a money-making device out of "nothing." *Ribā* is indeed considered unlawful because it implies exchanging *māl* for something nonexistent (*ma'dūm*) and because the exchange is unequal: the money, refunded *later,* is of greater value than the original one; but Ḥanafī practice had nevertheless to admit customary practices such as *istiṣnā', salam,* and *bay' al-wafā',* even though all of them implied investing into something that had no existence yet. But if usury implies making excessive gains (*ribḥ fāḥish*) out of something that has no existence (*ma'dūm*), two problems arise: 1) either any profit—however low—generated out of lending money is illegal—money is therefore not looked upon as "*any*" commodity for exchange, but simply as a non-*'ayn* whose "value" is what renders exchange itself more convenient and manageable under certain conditions[22] (if barter is to be avoided); and 2) if exchanging money for money is legally valid within certain conditions, it then all becomes a matter of quantifying the legally accepted margins of profit, which is precisely what the

18. The five piasters per *kīs* were calculated on a monthly basis as a one percent interest rate, that is, twelve percent for the whole year.

19. Beirut sharī'a courts, unnumbered register, p. 145, end of Jumāda II 1268 (April 1852).

20. I was unable to locate the text of the earlier firman.

21. On the notion of *māl mutaqawwam* and its implications for exchange, see Chapter 3 on contracts and obligations.

22. Qala'hjī, *al-Mu'āmalāt al-māliyya,* 36: "Currencies have value but are not tangible objects."

firman attempted to do: otherwise how is it possible to distinguish usury from a regular markup contract? The point is whatever we think the Ḥanafī position might have been—it has in effect hovered between (1) and (2), while leaning more towards (2) when customary practices became a de facto standard—it never legalized any specific margin of profit. On both counts, therefore, the firman constitutes a transgression.

In effect, Ḥanafīs, even when on rare occasions digressed on matters of money, never discussed its nature per se. For example, Ibn ʿĀbidīn's short essay on money only limits itself to price fluctuations, devalued or obsolete currencies, hence to shifting values that might arise among contracting parties.[23] And even though money-as-*nuqūd* was classified as *māl*—and, more specifically, as *māl bāṭinī* due to its hidden "invisible" character—it was still not looked upon as a tangible object, *ʿayn*. In other words, money was to be perceived as a special kind of object, a non-*ʿayn* whose sole purpose was for the "evaluation" of exchangeable commodities. This is particularly helpful for non-fungibles. But if at times a commodity has to be exchanged for money, money cannot be exchanged with itself, or at least if it was, then no "price" must be paid for that exchange. Perceived therefore solely as a "tool" for exchange, it thus became next to impossible to conceptualize money as having "value" *all by itself* whose "use" has a price (e.g., the payment of an interest). Hence neither the logic of "pricing" ever became an issue, nor was the logic of exchanging money for money ever raised at an analytic level.

Usury was common during the first half of the nineteenth century and probably expanded even more massively during the Egyptian occupation (1831-40) at a time when the presence of the European commercial houses and foreign traders spread more easily in both Beirut and Damascus (they had already been well integrated in Aleppo since the seventeenth century). The gradual commercialization of land and its produce increased the pressures on landlords, the peasantry, the *multazim*s, and all intermediaries to push for greater production within larger profits, as there were numerous factors that might have created larger margins for a money-market economy. All this meant more exchange of goods and services, both at regional and inter-state levels, and a greater need for cash. Money lending, though illegal, was nevertheless accepted on a de facto basis;[24] it then spread to such a degree

23. Ibn ʿĀbidīn, *"Tanbīh al-ruqūd ʿala masāʾil al-nuqūd,"* in *Rasāʾil,* 2:55-65.

24. Abdul-Karim Rafeq, "The Syrian *ʿulamāʾ,* Ottoman Law and Islamic *Sharīʿa*," *Turcica* XXVI (1994): 9-32, claims that loans with interest were never as officially widespread in Greater Syria as in Anatolia where the rate of interest throughout the seventeenth century was as high as 20 percent and apparently legally protected by the sharīʿa courts (p. 13). By contrast, courts in Greater Syria covered loans with interest only in a concealed manner and through well known legal devices, and with an interest that

that its regularization became a must. Early in the nineteenth century, money lending was limited to mostly wealthy Jewish *ṣarrāf* families located in Damascus; others did participate but at a much lower scale. By the middle of the century, with the movement of restricted commercialization that had swept agricultural production in Greater Syria, not to mention the newly promulgated Commercial Code in 1850, from which the 1852 firman adopted the twelve percent annual rate, the circle of moneylenders expanded considerably so as to include merchants, craftsmen, and landowners from Damascus.[25] By the 1880s, if not before, a commercial court in Damascus had already instituted the practice of money lending and legalized it by creating distinctions between the three dates of payment, protest, and convocation. But while by that time the creditors formed a wide array of wealthy merchants, landowners, and some of the consulates' employees, the debtors were mostly peasants—an indication that money lending was mostly tied to agriculture and that part of the agricultural surplus was transformed into cash in urban centers, and then reinvested in the same cycle of production.

Typically, when interest rates are higher than the yield on the land, the movement of land commercialization becomes redundant, so that both the exchange of land and cash lending are rare activities protected by all kinds of legal and extra-legal devices. Thus, once land is freed from the usual constraints and its commercialization becomes the norm, interest rates are brought much lower than their hitherto known rates of 20 to 30 percent. But in the *ancien régime* economies, interest rates were also high because of the risks of lending, storing, moving, and transferring money, not to mention, of course, the inadequacies of the judiciary when it came to the taboo question of interest rates.

The 1852 firman should therefore be looked upon as a prelude to the vast movement of money lending that swept Greater Syria in the decades to follow. The first proposed annual rate of eight percent was probably not accepted by moneylenders and considered not realistic as being too low (no date was specified as to when that rate was adopted). The state authorities were therefore forced, *mutatis mutandis,* to accept the twelve percent rate (what the firman did was probably to legalize the most commonly accepted rate, already in effect since the 1850 Commercial Code).

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often amounted to 25 percent by the mid-nineteenth century: "Despite these excessive, if concealed, interest rates, however, the Islamic courts in Syria did not compromise the *sharī'a* by legally acknowledging interest in credit transactions. *Ḥiyal* were used by both creditors and debtors in private dealings which fell outside the jurisdiction of the courts" (p. 22). However, as one of our cases clearly shows (C 3-1), concealed loans-with-interest could still be the subject of court action—a redrafting of the contractual settlement—whenever there is failure to deliver.

25. Ghazzal, *L'économie,* 98-100.

Besides imposing a new interest rate on loans, the new firman also pushed towards a unification of all rates. Apparently, a previous firman had permitted a special rate on money that was credited by orphans or waqfs: even though the text describes it only as a "special law," the exclusive regulations came with special interest rates. But could such rates have been higher than the previously legalized eight percent? Would it make sense to charge more when anyone could get it for less? It only makes sense therefore to envisage lower rates for the orphans and waqfs money. Surprinsingly, that rate was much higher, and no wonder a readjustment was long overdue.

> Since the funds of waqfs and orphans[26] enjoyed [as stated earlier] a special status, their profits [*murābaḥa*] should be settled according to the old [rate] of six piasters and a quarter [15 percent]. The moneylenders [*murābiḥ-ūn*] who have lent their money prior this date on the basis of six piasters and a quarter per *kīs,* should have their accounts [*ḥisābāt*] looked upon based on the receipts [*tamassuk-āt*][27] they kept. But those who did not follow [this rate] and lent money with a high profit [*murābaḥa fāḥisha*], their accounts should be looked upon from the payment date, and their profit should be set on the basis of five piasters per *kīs,* namely twelve percent, and every increase should be brought down [to that rate]. As to the poor who do not have much, their debts ought to be settled by agreement [*bi-l-tarāḍī*] from both sides, i.e., based on new receipts with one- to five-year installments.

Interestingly, the old fifteen percent rate[28] for the waqfs' and orphans' loans, while only three percent higher than the newly legalized rate, was seven percent higher in the previous system. But those who had already offered their credits prior to April 1852 were left with the opportunity to impose the same old rate on their debtors until all payments were completed; while those who lent money with rates higher than or equal to fifteen percent had to adjust them to the new low rate. In the old system therefore, the waqfs' and orphans' loans were privileged by almost twice the regular rate of eight percent: besides a social logic that could have imposed such large variations, how was it possible, based on pure economic logic, to keep two official rates with so much difference? One thing is certain: had the system worked out properly, there would have been no need to reconsider the two-rate system; and the 1852 rate was in between the two older ones. What might have happened, after the first monetary regulations came through, was that independent moneylenders

26. That money could either have originated directly from cash, the selling of properties for cash, or else it was the outcome of recycled surpluses.

27. Again, one of those words with no root in official Arabic. The verb *tamassaka* means to cling to, or persist in. So, presumably, *tamassuk-āt* refers to the contractual receipts detailing the debt's amount and the mode of payment.

28. Calculated as follows: (6.25/500 x 100) x 12.

refused the lower interest rate imposed upon them and went with the higher fifteen percent, while waqf administrators and guardians of orphans' money charged even higher rates, hence the "difficulties and problems" alluded to at the beginning of the firman.

After the "general regulations [*niẓām 'umūmī*]" have been thoroughly described, the text directly addresses, once more, its original addresses: "You, the aforementioned wālī, and the head of the majlis, etc." The purpose was to hold them responsible for the dissemination of the new regulations: "our decree [*irādah*] should be announced and disseminated in all places under your control so that it be applied in all sharī'a courts and the majālis of the provinces [*bilād*]..." Such an organization also implied that both creditors and debtors could no longer act on their own but only under an official umbrella.

> The practice of offering and demanding loans [*al-iqrāḍ wa-l-istiqrāḍ*] is not to take place between debtors and creditors [*al-madyūn wa-l-dayyin*][29] on their own, but you should make sure that loan making be performed with the full knowledge of the majlis of the locality, and all receipts should be based on [accurate] calculations. And if while our regulations are implemented, someone dares to give or receive loans secretly without informing the majlis of his locality, and defies [the authorities] by taking and giving with a higher profit than the twelve percent annual [rate], his case should be communicated to the authorities together with his name and surname in order to proceed with the needed punishments.[30]

The notion of "loan (*qarḍ*)" is introduced only in that concluding passage. That the text manages all through to impose new regulations on money lending while avoiding the fact that "profit" is based on "loans" is indeed surprising, but it shows how much cautiousness and linguistic strategy are important whenever non-religious officials are stepping into a territory in which Ḥanafism applies. The firman thus manages not to step into the jurisdiction of the sharī'a courts: 1) by avoiding any direct reference to usury (*ribā*); 2) by ignoring all suspicions that Ḥanafism has contributed towards usury in particular and money lending with interest in general; 3) by limiting the text to *murābaḥa,* a form of markup contract; and, finally 4) by creating an implicit demarcation between *murābaḥa* and the practice of loan-with-interest, *ribā;* the former had thus been legalized and regulated while the latter remained taboo.

The firman also imposes, regarding all loans with interest, written contractual statements so as to be legally binding; this is another domain where sultanic legislation has circumvented Ḥanafī practice. In fact, as most sharī'a court cases show, since covenants could be orally performed without any ensuing

29. *Dayyin* means religious and pious, and is incorrectly used here in lieu of *dā'in,* creditor.

30. No punishments were specified.

written statement, they would become legally binding in a court litigation if plaintiff and/or defendant are able to furnish evidence in the form of witnesses. Indeed, an essential aspect of fictitious litigations, as described throughout this study, was to transcribe in writing the various contractual settlements and ownership transfers that the disputants had orally concluded. What the present firman does, however, is to require written statements for all loans, which would also have to elaborate on the interest rate, mode of payment, and date of maturity agreed upon. Even though the text does not openly disavow oral covenants, the requirement of "receipts" at every juncture does suggest that it would be hard for the newly established councils to accept a covenant as valid if orally concluded. Moreover, the sharī'a courts would not be able to handle such cases either because of procedural limitations, or that it was not in their tradition to specify profit rates. Finally, the firman indirectly acknowledges that money is a commodity that could be exchanged in lieu of a margin of profit that the borrower pays to the lender, or in the jargon of Ḥanafism, money achieves the status of a *māl mutaqawwam* that is legally protected.

Neither conscription nor loans with interest are Ḥanafī strongholds, and that is precisely why sultanic legislation stepped in. In fact, even the existence of such texts among the daily routines of the sharī'a courts points less to how much the two legal spheres were in need of one another, and more to their marriage of convenience: both firmans found their place within the courts registers, but not a single case between 1843 and 1860 had any relation to either conscription or payments of interest loans. (The Damascus regional council carried few such cases.) Clearly then the purpose was simply to let the judges know and keep them informed so that they in turn could act as consultants to whomever might be concerned. But the direct, and often impatient, language of the firmans hides too well how much such texts were mindful of all the constraints under which Ḥanafī practice was operating. Since the firmans had to step over the jurisdiction of the courts, there could be no harmony between the two since the former were transgressive to some of the main precepts of the fiqh; but only a balanced policy would circumvent the major stumbling blocks of tradition while creating that parallel legislation. That is why describing one system as religious and the other secular and rational is misleading. For one thing, the firmans of the 1840s and 1850s shared very much an ad hoc approach to all kinds of impending issues, and in the absence of a more systematic line of thought, their rationality remained very partial. In fact, only the fact that sultanic legislation operates without the constraints of Ḥanafism gives it that lay character, one that deprives it of its clerical tradition. Even if we believe that legal systems are more the outcome of practice than logic, the confused identity of the firmans ties them to several conflicting worlds rather than to a well defined logic.

[C 10-3] If Ḥanafism did not regulate conscription, or carefully assess profit margins, customs (*gumruk/gamārik;* written *kumruk* in a mixture of Ottoman-Arabic)[31] fell too outside its scope. Hence we see a firman, dated February 24, 1846, a copy of which was kept in a Beirut court register, devoted to the land and sea customs of the empire.

Like the previous firmans, this one is in Arabic only, and addressed to the familiar set of personalities: the wālī of the province of Sidon, its defterdār, the mutaṣarrif of the sanjāq of Jerusalem, the mayor of Acre, the chief-judge of Jerusalem, and finally, to all the *'ulamā'* who were either customs agents in seaports (*kumrukjiyyat al-asākil*), or members of the majālis, or simply the *a'yān* (referred to as *wujūh al-bilād:* the faces of the nation) of the provinces of Sidon and Tripoli. The list is therefore much broader than the previous ones because of the scope of the matter: customs and tariffs; the choice of the personalities had therefore to conform to a wide territory covering sea and land customs in relation to both Beirut and Sidon (such as Jerusalem, Acre, and Tripoli). Left with a non-specific title—"Copy of a highly important firman"—the firman was drafted in a very poor Arabic, and looks more like a poor interpretation of the Turkish original (for which no copy was provided, assuming that an original did exist). The aim was a reorganization of customs duties—or, more precisely, the obscure link between land and sea customs—in parallel to a new division of commodities between those locally consumed, and hence could be exempted from taxation, and those in transit to other provinces, if not to other countries, and to be taxed at their port of shipping.

> It ought to be known that in the old times there was no land customs at Wārnah.[32] Last year, in 1261 [1845], based on the unfolding [*ṣayrūrah:* becoming] of its events [*ṣayrūrat aḥdāthi-hi*], and because no supplies [*dhakhāyir*][33] or things came by from the *nāḥiya*s of the *qaḍā'*-s[34] [surrounding the above locality], the people felt [financially] strained, and because of this, they requested that they be exempted [*al-'afū:* to be pardoned] from the aforementioned customs duties, while leaving the latter controlled [under a new regulation].[35] The reality is that when the new land customs, created in the [two] provinces of Anatolia and Rumeli [Rumelia],[36] were abandoned [*alqā*], while the old land customs together with the sea customs constitute an exception [*mustathnā:*

31. *Jumruk* in modern Arabic.

32. This locality could not be identified.

33. Colloquial plural of *dhakhīra,* whose plural is *dhukhr.*

34. The text says *qaḍāwāt,* a colloquial use of *aqḍiyah,* plural of *qadā'.*

35. The text says *tarki-hi bi-maẓbaṭah.* This last word seems a colloquialism from *ḍabṭ,* seizure; adjustment, regulation. The meaning is yet uncertain.

36. *ar-Rumallī,* that is, *bilād al-Rūm,* territory of the Byzantines, name created by the Ottomans for the two provinces of Macedonia and Thrakê in the Balkan.

> excluded].[37] Thus, only the land customs that were abandoned [*ṣāra alqā-hum*][38] had their dues collected in the [same fiscal] unit [*muqāṭa'a*] whether it was consumed [*tuṣraf bi-maḥalli-hā*] or sold or sent from one qaḍā' to the other; their municipal dues [*rusūmāti-hā al-iḥtisābiyya*][39] were collected [and included such products as] wheat, barley, flour, Egyptian wheat, and corn, in addition to the products that were shipped by sea and sent somewhere else. What is locally consumed [*yuṣraf bi-maḥilli-hi*], or sold and sent to another [fiscal] unit, or from one village to another, should not be even subjected to a customs tax. Only merchandises, things, and possessions [*arzāq,* s. *rizq*] that are consumed all over our empire, should be taxed, at a seaport, with a nine percent tax [known as] *rasm āmadiya,*[40] but once moved [from the locality] so that they be shipped by sea or transferred by land to another locality, a three percent tax [known as] *kumruk raftiyya*[41] should be collected.[42]

The firman's introductory passage is already confusing, and even though the overall meaning will get clearer only towards its end, a preliminary recapitulation is nevertheless worth the effort. (1) There were two types of customs, the old and the new, and some, if not all, of the new might have been dropped and the purpose of the firman was to remind of the old taxes that were levied on both land customs or seaports. (2) Goods were categorized according to either local or outside use, that is, they were either locally consumed, and hence not subjected to taxes, or were in transit to another location, and hence taxed accordingly. (3) Five types of grains (see below) enjoyed a special status and categorized apart from the other commodities. (4) It is not clear how customs duties, whether old or new, in Anatolia or Rumeli (since those were the only two provinces singled out in the firman), should have affected the circulation of commodities in Greater Syria (to which the firman was addressed in the first place); the text in fact avoids any mention of the major seaports of the region where the bulk of customs duties were

37. Should have been *mustathnāt.* The meaning, however, remains far from clear: Were both the land and sea customs excluded? And excluded from what?

38. As in the previous sentence, the use of the verb *alqā* is unclear. For one thing, not even its spelling is correct: it should be without the *alef* at the end; then, its use in the sense of discard or cast away is uncertain. But what else could it be?

39. It is uncertain whether those taxes were the same as those collected elsewhere in the empire as *ihtisap resmi,* see, Stanford J. Shaw, *History of the Ottoman Empire and Modern Turkey. Volume I: Empire of the Gazis: The Rise and Decline of the Ottoman Empire, 1280-1808* (Cambridge: Cambridge University Press, 1976), 120: "the municipal tax (*ihtisap resmi*) [was] collected by the market inspector (*muhtesip*) from all artisans and merchants as part of the licensing and regulating process."

40. Could not determine what this tax was: Was the word *āmadiya* (or *āmadiyya?*) derived from *amad,* duration, period, or time?

41. Could not identify the meaning of the term and the role of this specific tax.

42. Beirut sharī'a courts, unnumbered register, pp. 196-97, 27 ṣafar 1262 (February 24, 1846).

levied: Tripoli, Beirut, Sidon, and Acre. (5) A notion of a fragmented space begins to emerge: space looks as if controlled by several deeply infiltrated local powers (to which the firman devotes a lavishly drafted introduction) to which concessions had to be made for a successful implementation of the new regulations, and to which other regional powers had to succumb. The relations between the two on the one hand, and the central authority on the other, determined how freely commodities circulated between provinces, or how they were taxed; in fact, distinctions between land and sea customs, old and new, were an outcome of regional and urban power-relations and their struggles with the central authority.

In this segregated space, subject to so many negotiations, locations (referred to as *maḥallāt*), tax-duties, commodities, and above all people fell into hierarchies depending on their nature, substance, and social (hence economic) status. Thus, while the middle part of the text focuses exclusively on some foodstuffs such as (cooking) fat, oil, sesame, rice, honey, molasses, and cheese, all such products, essential as they were to the cooking habits of the people of the region, were taxed once delivered in any of the seaports; but if by 1254/1838, no tax-duties were imposed on those products, that would imply that the specific location (*maḥalla*) to which they were to be delivered had no customs: new ones should have then been created by that time. Those products which "used to be shipped by land [to a seaport] and the customs were all land customs." The majority of sea customs were then created by 1838 for all localities that did not have one, and the corresponding land customs became obsolete: what the firman was attempting to clarify was which duties should be imposed and where. Giving a preference to seaport customs was probably a way for the central authorities to better control taxation; but in the meantime, some of the old land customs kept apparently functioning either out of confusion or by pure abuse from local forces.

As in the previous firmans on conscription and money lending, a tension survives in the text from the fact that the legislators were attempting to convince their addressees of the benefits of the new regulations, either the new conscription system, or the new interest rates, or the newly created sea customs and their corresponding taxes. But the legislators did so only with a cautiousness that translates into left out assumptions. Thus, concerning the foodstuffs enumerated above, the text made it plain that no duties should be imposed on them whenever they were destined "to the populations who need them for their food and to the poor for their basic needs." Not only such statements, destined for local consumption, were difficult to apply (what would be the criteria for poverty?), but they only helped in creating circles within circles of hierarchies within an already parceled space: thus, those "tax-free" foodstuffs in the newly erected sea customs (post-1838) still had to

pay some of their "old duties (*rusūmātihā al-'atīqa*)" for delivery and market inspection. Moreover, space fragmentation also implied that orders be issued *individually* to the military police chiefs (*mushīr-īn*) of Anatolia and Rumeli, the wālīs of the provinces, their *mutaṣarrif*s, defterdārs, *a'yān,* and all officials responsible for levying customs duties: it is as if the state authorities had to re-negotiate the actualization of its firman with everyone on the ground.

Interestingly, only in the concluding part does the firman address itself in the first person singular: my order, my firman. That in itself is enough to create a dramatization effect: the sultan as the sole *ex officio* legislator addressing himself *directly* to his *ra'iyya* and their *ex officio* "representatives." Such a step proves even more dramatic once the text addresses itself to the judges of the sharī'a courts: that is, to the other equally important source of legislation where the law was to be applied.

> Once my firman, with its noble imperial title, reaches [its destinations,] its content shall be explained [*tafhīm*] to everyone concerned; and my high order will be implemented [*yunaffadh*] in the *sijill*s of the [sharī'a] courts, as stated above, so that the five grains [*al-ḥubūbāt al-khamsat*][43] [wheat, barley, Egyptian wheat, corn, and fodder] and their flour are destined to all places. Those are not subject to a customs tax [*rasm kumruk*], and with your[44] opinion, knowledge, and the knowledge of the honorable *shar',* and the agreement of everyone with me, it was decided that a customs tax should be levied on the commodities and things that are shipped by sea, as stated above, in the seaports that already have [new?] customs; and those who have old land customs, a custom fee is imposed on [foodstuffs] shipped by land to those places, such as fat, oil, sesame, rice, honey, and brands of molasses and cheese, based on the fee list. And in case this does not apply [to some localities], such as the qaḍā'-s and *nāḥiya*s located on coasts with seaports and to which land customs have been created prior to the year 1254 [1838], no customs duties should be imposed on fat, oil, sesame, and the other listed products [above]; only the *iḥtisābiyya* and the other old duties should be collected based on the [latter's] principles and regulations [*uṣūl-ahā wa niẓāmu-hā*].

43. More accurately: *al-ḥubūb al-khams.*

44. The addressees were probably here the *'ulamā'* and judges.

Table 10-1
Classification of customs duties and their respective commodities

Commodities	**Commodities shipped by land to seaports with customs**	
	Locations with old land customs	*Qaḍā'*s and *nāḥiya*s located at seaports with newly post-1838 created customs
The five grains	No customs	No customs
General	Tax duties on cooking fat, oil, sesame, rice, honey, molasses, and cheese.	(1) No customs duties on oil, sesame, etc. (2) Only the *iḥtisābiyya* and other old duties should be levied on the products listed in (1): this applies only if those duties had already been collected in the past. (3) In case all the above products are not destined to be consumed locally in the first place, and are to be sent to seaports in order to be shipped to other localities, the *āmadiyya* and *raftiyya* customs duties should be collected.

The firman's overall purpose was therefore to clarify the relationship between new and old customs. That said, the deployed strategy takes several twists and turns worthy of consideration. In a section preceding the above quoted passage, the text shifts from the third- to the first-person singular, thus representing the sultan as both legislator and addresser: this is done to highlight the tension between what is being said and proposed, on the one hand, and its implementation (e.g., at the regional borders and urban councils) on the other; it also helps in highlighting apparent failures in previous implementations of similar regulations, and does so by having an "I" address itself directly to the groups concerned: "[my own firman is intended to insure] my exalted imperial help[45] to the aforementioned inhabitants [of villages and localities] as long as the merchants do not [as they did before], and contrary to my will, misinterpret the last regulations designed to collect customs duties on movable things. Appropriate punitive measures [*tādībāt lāyiqat*][46] [will be implemented] to find who is the cause [behind a bad implementation of this firman.]" The text then overtly wishes the firman to reach its destinations as soon as possible so that its ethos would disseminate among all those concerned. The legislator and firman's interlocutor therefore looked at his own creation not simply as a set of orders to be obeyed, but, more important, as a *textual construction*

45. The text wrongly uses the colloquial *musā'afatī* instead of *musā'adatī,* my help.

46. *Ta'dīb* has two complementary meanings: as education and refinement, and also as discipline and chastisement. The text plays on both meanings while it intends to be threatening.

whose cultural ethos he expects to be properly disseminated and understood. An anguished tone pervades throughout for having been misunderstood in the past and out of fear for a possible repetition of such misunderstandings in the future. Thus, the textual strategy consists in (1) positing the legislator-interlocutor as the victim of grossly manipulated misunderstandings; (2) some groups (among them merchants) could have contributed to all this because the new regulations were not beneficial to their interests; (3) if understood properly, the firman would look all too human: some products, such as the "five grains," were not taxed because they were part of the basic foodstuff of the poor; while others were partially taxed; and (4) the text underscores distinctions among people, products, regions, and types of customs and customs duties.

Such strategies are indeed common to "legal" texts that are heavily personified and not based on a coded system. Instead of simply stating in an abstract and systematic code what the rules and laws are, the text proceeds by creating a "person" as an interlocutor, who coordinates with the role of the legislator. "His" global role, however, is not limited to legislation but to also justify the system and all newly promulgated laws. "He" thus must convince, prove, persuade, accuse, and threaten. At times, he must even point to specific individuals and groups: naming makes them directly responsible for the dissemination of the text's meaningful purpose as intended by the legislator. In fact, in all three firmans the text deploys a strategy constructed around an anxious perception that a misunderstanding between legislator and addressees is always possible. First, it does this by raising the possibility that the text might be misunderstood by its addressees; that was related to difficulties in understanding texts in general and new regulations in particular, or to linguistic and cultural barriers (many firmans were drafted as bilingual texts with a heavy use of colloquial Arabic). More seriously, though, firmans were more concerned with deliberate attempts to manipulate texts and willful misinterpretation of them—precisely by those same addressees—whose economic and political interests might clash with the new proposals. Second, and considering that the first set of noble addressees were in principle only the "intermediaries" to the sultan's *ra'iyya,* the firmans play at times on the ambiguity of the *ra'iyya*'s interests versus the notables class as a whole. Because firmans tended to represent themselves as legislated for the sole purpose of taking care of the people's interests and well-being (with a particular emphasis on the poor and needy), a hidden assumption loomed over the surface: that a poor implementation of those regulations, or their misinterpretation, or simply the fact that few even knew about them, were all the outcome of the policies of the dominating regional élite groups (due to opposing interests, or attempts to maintain their coherence in the troubled period of reforms, etc.). In short, firmans kept harping on the assumption that they were indeed either unknown

or else misunderstood by the general public, or, worse, that they were the subject of gross manipulations.

The technique of equalization

Ernst H. Kantorowicz pointed to a medieval juridical technique known as the *aequiparatio:* the action of considering in equivalent terms two or several subjects who *a priori* did not belong and had nothing in common.[47] For example, the church, a city, or a madman were from a technical point of view formally equal, because considered as "minors," as they were unable to take care of themselves and their own business; each one therefore needed a tutor. The law proceeded by a method of "equalization"[48] that brought together, under one legal framework, very different institutions, corporations, and individuals. Needless to say, such a method had immense implications beyond the juridical. Thus, the legislator who created legislations and judgments with no textual "precedent" relied on divine inspiration: his *ex officio* action was based on an imitation of nature—hence on an equalization between the creativity of nature and that of the legislator—rather than on an artistic or poetic genius (the association—or equalization—between the creativity of the legislator and artistic genius was to be brought later in Dante's *Divine Comedy*).

The method of equalization was also commonly used in Ḥanafī practice even though its origins are uncertain. In one such case encountered earlier, the *ra'iyya* were looked upon as orphans, with the sultan acting as their guardian: "The imām was appointed [*nuṣṣiba*] administrator [*nāẓir*] over the interests of all Muslims. And it was stated in [Ibn al-Humām's] *Fatḥ al-qadīr* that [by analogy] he acted as the guardian to an orphan."[49] The purpose here was overtly political and economic: by reducing all the *ra'iyya* to the status of orphans, thus equalizing them under the legal category of "incompetents" and "immature," the sultan had full possession of their properties—a legal fiction that was common throughout the Ottoman period to justify the massive state ownership of lands. The political implications behind such justifications were enormous: it justified legislations and political decisions that were enacted without ever consulting the *ra'iyya.*

[C 10-4] Equalization also became an important tool in sultanic legislation (even though the history of such practices is far from receiving the attention it

47. Ernst H. Kantorowicz, *Mourir pour la patrie*, translated by Laurent Mayali & Anton Schütz (Paris: Presses Universitaires de France, 1984), 51-52.

48. In the French translation: "équiparation."

49. Ibn Nujaym, "Risālāt," 104a.

deserves). In a firman dated October 14, 1866, during a period of intense legal reform, four different categories of individuals were equated under specific legal procedures: all individuals, whether Muslims or non-Muslims, male or female, who were beneficiaries of an inheritance, were subjected to special procedures in case they were minors, madmen, handicapped, or traveling abroad. Thus, those four broad categories of individuals, minors (who were also orphans), madmen or madwomen (*majnūn aw majnūna*), the handicapped of both sexes (*dhū aw dhāt ʻāha*), and travelers abroad, even though they did not share anything in common—why should a traveler be "associated" with a madman?—became by virtue of the law a common legal category under which judges could adjudicate. The only element that brought them together, by means of analogical reasoning, was that they were all beneficiaries of inheritances of persons who had just died: the logic was that such beneficiaries were either immature (the minors), or mentally or physically unfit (the madmen and handicapped), or unavailable (the travelers) to conduct their business on their own and hence benefit from the inheritances without running the possible risk of duress or manipulation by others. So, the law poses itself as the sole protector of such individuals: it creates a special legal code for them, and any unauthorized use of their properties would have been perceived as unlawful.

The syntax of the firman is much different from the previous ones. For one thing, the 1860s was a period of intense judicial reforms: the Ottoman legislators and reformers became fully aware of the importance of the systematic and rational character of the nineteenth-century French codes beginning with the *Code civil* or *Code Napoléon* (1804), the *Code de commerce* (1807), and the *Code pénal* (1810); and the laws promulgated during the second Tanẓīmāt period reflect a desire for systematization and bureaucratization (the two go hand in hand). Such a desire was visible in the establishment of new courts in need of clearer more coherent codes, and the limitations imposed on the traditional sharīʻa courts which reduced them to personal status matters (this dual system still works today in both Syria and Lebanon in roughly the same way). But even though the 1866 firman was primarily destined to the sharīʻa courts (and a copy was kept in one of the *sijill*s),[50] because matters of succession (*tarikāt*) were still within their jurisdiction, it followed an organizational structure that characterized later firmans and codes (including the 1877 Majalla, based on the traditional Ḥanafī literature): divided into sixteen numbered articles (*mawād*), the text was handier for consultation than older firmans.

50. Beirut sharīʻa courts, unnumbered register and pages, 4 Jumāda II 1283 (October 14, 1866): bilingual text (Turkish and Arabic), printed at the press of the Syrian provinces (*maṭbaʻat Sūriyya*).

The first article begins with a clear request to the local authorities in order to immediately proceed in preparing a succession (*taḥrīr tarika*) of a deceased person who, included among his beneficiaries, were at least one of the following: an orphaned minor,[51] a madman, a handicapped person, or an absent inheritor (*ghā'ib*), all of both sexes, whether Muslims or non-Muslims. Such successions were to be prepared in the sharī'a courts (Christians, according to the fifth article, had to follow their own procedures) with the knowledge of the imāms, *mukhtār*s, and priests of the villages and other locations (*maḥallāt*) who, in turn, should immediately inform the government (*al-ḥukūma*)[52] of such special successions (that is, limited to the four categories). The aim of such an enterprise was to create a "treasury for the orphans (*ṣundūq al-aytām*)." Interestingly, even though the other three categories were totally unrelated to the orphans as such, they were still subsumed under this broader umbrella of orphanage. Thus, indeed, orphanage did act as reference to all four categories since it was in a way the model to which all others were analogically related: minor orphans, because of their incompetence, do "naturally" need a guardian, and that kind of image became legally and politically dominant in the Ottoman empire to legitimize the state massive ownership of rural lands. The other three categories—the madman, handicapped, and absent beneficiary—were the ones "equalized" to the norm—that of the incompetent minor orphan in need of guardianship. The two key legal notions were therefore incompetence and guardianship: this made it possible for a group of people, either individually or collectively, to act on behalf of others, dispose of their movable and immovable properties, and, in the sultan's case, make political decisions and legislate on behalf of his *ra'iyya* without any prior consultation with those concerned, thus de facto ruling out a legitimate delegation of powers.

Equalization was therefore the first method, among several legal notions, which brought together four different groups of individuals. That also implied full submission to their appointed guardians, and because of the alleged incompetence of those individuals, the implication of equalization was that some individuals—defined by law, as an outcome of their incompetence, as equal in status—had their entire wealth in the hands of others (their guardians, but also as the state's public property). In fact, the outcome of this whole "orphans fund" was only explicitly stated in article seven: to create a system of loans with interest from the orphans' movable and immovable properties

51. Even though the text refers to this category of beneficiaries as *ṣaghīr/ṣaghīrah,* minors, the clear implication throughout was that those were orphaned minors.

52. No indication is given as to whether this government was central or local, that is, limited to the wilāya in question, even though it does seem from the overall tone that the latter possibility is more probable.

(*amwāl al-aytām*). Such a fund should have in principle been established in every *qaḍā'* of the empire and its use was to be public: in other words, after fulfilling some conditions imposed by law, individuals could borrow amounts of cash from those funds; interests were charged, and those interests were to be added to the fund. Thus, orphans funds did (assuming that the whole enterprise worked well enough as prescribed by the firman), grosso modo, what all banks do today: lend money to particulars and charge them with specific interest rates. The enterprise could also be seen in conjunction with an earlier firman (C 10-2) legalizing and setting limits to loans with interest.

Besides the first major legal step of equalization, creating such a fund implied an even bigger judicial move. To be sure, establishing a "public" fund out of movable and immovable private properties was no ordinary step, even by Ottoman legal standards. Indeed, such a step implied "confiscating" privately owned properties and placing them in the public domain for the public good. The confiscation, however, was in theory for a limited period only: once the minor matured s/he enjoyed the full legal right to appropriate his/her properties; the same applied to the absent beneficiary who returned home, and the madmen/women who gained reason, or the handicapped who was cured—all of them, once achieving the status of "normal," could make full use of their (inherited) movables and immovables.[53] Two questions need to be posed at this juncture: 1) What were the judicial foundations and precedents behind such a public appropriation of private funds? and 2) How were the madmen and handicapped to be determined: according to which medical criteria? And why would a handicapped person be perceived as mentally unfit to take care of her properties? Obviously, the assumption here was that minors and absent beneficiaries would be easier to delimit, even though the category of "absent" might end up confusing: How far away should a person be, and for how long?

Sharī'a law did demand guardianship on some categories of individuals, such as a minor orphan and a madman, on the basis of a mental incompetence, but it did not suggest, however, transforming their properties into public funds from which particulars would borrow money (loans with interest were anyhow forbidden). The only legal precedent that comes to mind here, as mentioned earlier, was that of the sultan acting as guardian over his *ra'iyya*'s properties; but that was on the basis that those properties had their owners die without heirs—the legal fiction of the death of the kharāj payer. Private lands thus became public properties (*arāḍī amīriyya*), owned by *bayt al-māl:* that was a legal fiction to represent the sultan as effectively disengaged from "public" landownership. No clear precedent was thus available in transforming private properties into a quasi-public fund. From the point of view of sharī'a law,

53. Interestingly, the text limits itself only to the *inherited* movables and immovables whose testators died after the firman's date of promulgation. It leaves out all properties (if any) that all four categories of individuals might possess from outside that particular inheritance.

therefore, such an enterprise would have been strictly illegal because loans with interest were unlawful.

However, one of the general Ḥanafī rules states that "private guardianship is stronger than a public one [*al-wilāya al-khāṣṣa aqwa mina al-wilāya al-'āmma*]" (Majalla, 59), so that a judge has no right to decide on his own what to do with a minor's fund or a waqf as long as a guardian, tutor, or administrator is available. But—and that's the main point in favor of our firman—a judge may nevertheless use a minor's fund as a source for lending money, while the guardian or tutor do not share such a privilege, and the reason for giving the judge such discretionary powers lies in the fact that looking after waqfs and orphans is a "public interest [*ḥaqq 'āmm*]," thus explaining the limitations that guardians are subject to in that respect.[54] Yet, it was still a long way to go from the authority of the judge to that of the sultan, and Ḥanafīs did assume that such rules originated solely from the fiqh itself, and that the judge was the "public figure" in such matters rather than the sultan. Moreover, the conflation of interests that might occur between the fiqh and sultanic legislation was perceived by Ḥanafī scholars as part of the *maṣāliḥ mursala,* that is, all those public interests which are neither condemned nor particularly recommended, and which the fiqh only *temporarily* accepts *faute-de-mieux* on the basis that not doing so would harm the interests of common people.

The framing of the sixteen articles leaves out the issue as to who would be responsible in determining the sane from the insane and the handicapped from the normal: what if someone was physically disabled but mentally capable? Sultanic law here simply followed the shar' in the general implicit assumption that the insane, disabled, and invalid were all to be "discovered" in their "handicaps" by their "community" (in particular the family).[55] In other words, objective criteria for insanity had not been worked out by an autonomous discipline such as medicine, as was the case in early modern Europe.

The procedures for transforming privately owned properties into a quasi-public fund that in principle was still owned by its original beneficiaries are worth following in detail. The second article demands that the local government[56]

54. Zarqā', *Madkhal,* 2:1049.

55. Samadar Lavie, in her work on a Bedouin tribe in the South-East of the Sinai desert, noticed that not only were some persons were labeled as "mad" or "insane," but, more important, they became what she defines as an "allegorical character," such as the madwoman, who by virtue of their "rejection" from the tribe, became the bearer of "truth": in other words, she became the "collective consciousness" of a tribe in a period of rapid and harsh transition marked by excessive pressures from the Israeli market for cheap Arab labor, and thus ended up saying what others had feared and dreaded, see *The Poetics of Military Occupation* (Berkeley: The University of California Press, 1990).

56. The extensive use of *ḥukūma* in this second Tanẓīmāt period reflects, compared to earlier periods, an effort to modernize and centralize the local bureaucracies, even though much of the work was still done as in the good old days: *ḥukūma* should thus refer to the wālī and majālis of the cities.

draft a "daily attestation"[57] detailing all the "happenings (*wuqū'āt*)"[58] of the day in terms of all deceased individuals with an inheritance (or part of) that would be subjected to the new regulations; in that case, the succession should be completed as soon as possible and all relevant information was to be submitted to *nā'ib Efendi* (deputy to the wālī?). Moreover, in what the text describes as a "remark [*mulāḥaẓa*]," all properties and things inherited by the beneficiaries should be "sealed" by someone from the sharī'a courts so that all "movable things [*al-ashyā' al-manqūla*] do not get lost;" and such measures should be applied even during the period of the funeral and mourning: "because it would be inappropriate to force out the children and family of the deceased from his own home and leave them out at the moment of the funeral, it is therefore advisable that all valuable objects that could be hidden or lost, to be placed [for safety] in one room or two, or be boxed and sealed; while all things needed for everyday home use would be left with the beneficiaries." The safety measures were therefore extreme, and considering that all those properties and objects were *privately* and legally transferred from one individual to another, they look quite extraordinary. In fact, the sharī'a courts usually applied such draconian measures only when a problem emerged in the succession because, say, of a conflict between the beneficiaries, or when an official died far away from home (court registers do contain "orders (*awāmir*)" either addressed to the chief judge or to the wālī prompting them for immediate measures concerning the successions of some high-ranking officials).

It becomes clearer by the third article that the process was indeed one of seizure by the state of privately owned movable and immovable properties, and that the whole notion of "unfit to take care of your properties" played all too well as a pretext to convert some immovable properties into cash and make this money available as a public fund. It remains to be seen, however, how much weight the four categories of unfit persons effectively carried. The third and seventh articles clarify the essence of the process: first, convert as much immovables as possible into cash, and then place it into a public fund, while all properties that proved hard to convert in the process would also be used for other public purposes. Thus, the third article states that "whatever the value of the succession [left to the beneficiary], the properties and lands that should be kept as *'ayn,*[59] in addition to few other things, which based on need [*ījāb:*

57. The text wrongly uses *būṣulah,* compass, instead of *būlīṣah,* broadly meaning an "attestation" of a transaction of some kind that took place; more specifically, it could denote a policy (insurance policy) or a bill of lading.

58. More correctly: *waqā'i'*.

59. That is to say, not transformed into *māl,* an object ready for exchange and legally protected as such, or the properties left in the possession of the orphans for their own private use.

obligation],[60] [might turn out necessary to keep,] should be left to the orphan;[61] while the things and *amwāl* that would be damaged [*yulāḥaẓ talafu-hā*] should be sold in auction, with the knowledge of the guardian and representative, at its fair price [*thaman al-mithl*] in order to transform it into cash [*naqd*]." Interestingly, this article recapitulates many of the "economic" categories that the fiqh worked out for centuries: namely, the distinction between *a'yān* and *amwāl,* and how the tangible thing, *'ayn,* becomes an exchangeable thing, *māl,* or *res in commercio;* in turn, the *māl* could be exchanged with another *māl,* money for example. Thus, what was of interest to the committee responsible of the orphans fund (it had its own majlis) was the process of transforming as much *a'yān* into cash (*naqd*), and the less *a'yān* were left in the way, the better. Since the "orphans"[62] were "allowed" to keep the properties they needed, the process was tied to what was meant by the "things that would be damaged" since that was the targeted category that ought to have been sold in auctions.

Because of the key role played by guardians, the fourth article makes it mandatory to "choose and appoint [*intikhāb wa ta'yīn*]" "reliable" guardians for the orphans, madmen, and handicapped (the absent travelers are for an unknown reason left out): that was the responsibility of the *majlis tamyīz al-ḥuqūq,* as it was called. The fact that there was a special majlis to appoint guardians might be an indication as to the interests the latter were protecting: it was unlikely that the guardians were defending their clients against the majlis, and considering that the whole enterprise aimed at generating as much cash as possible, guardians were chosen precisely to study well their clients' portfolios and determine which properties and items did fit best with the general policy. The fund also had an appointed director, under the official name of *mudīr amwāl al-aytām,* whose main function was primarily to manage the costs of selling all objects that could be sold in the succession (excluding landed properties):[63] thus, for every one thousand piasters of sold items, the *mudīr* kept twelve for himself (probably as an equivalent to a "salary"), gave five piasters to the auctioneer (*dallāl*) and three to the sharī'a courts; the main expenses in transforming *a'yān* into cash were therefore directly deducted from the auctioning itself.[64]

60. Legally, *ījāb* means offer and is part of the "offer and acceptance" contractual settlement: see Chapter 3 on contracts.

61. Orphan (*yatīm*) is used as a generic term for all four categories.

62. "Orphans" between quotations marks is generically used for the four groups as a whole.

63. The text says: *al-arāḍī wa-l-'aqār wa-l-amlāk;* all of them designating, in the final analysis, landed properties.

64. In order to fully implement the phenomenon of "the office as vocation," a bureaucracy must be based on salaries rather than "benefits" that state employees and the like would accumulate from their work. In other words, an employee's income must come from an independent source as salary and unrelated to

The whole purpose of the enterprise was finally clarified in the seventh article: the creation of a separate *ṣundūq* ("treasury") in each qaḍā' in which all the cash paid for purchasing items from the successions had to go. Detailed lists were kept so as to make sure that each "orphan" had his cash correctly calculated.

> If someone wants to borrow money from the funds of the orphans kept in the treasury, he should present himself first to the majlis of the city in order to show to the majlis the things that he would like to deposit as security [*rahana*] or give in pledge. Once the insurance [for borrowing money] has been provided [and approved] by the majlis, the aforementioned treasury is brought to the majlis in the presence of the *ḥākim,* the majlis, and the treasury's deputy (*ma'mūr*), in addition to a court's scribe and the [orphan's] guardian. The requested amount of money is then credited to [the borrower] from the orphan's fund. Asking for a loan [*istiqrāḍ*] should therefore proceed at the sight of everyone, and [the money] is handed to the borrower after listing in the loan contract all things that had to be deposited as security, or the lands open to a possible *farāgh* transfer, or properties that could become the object of *istighlāl.* But in case the borrowed sum was only linked to a guarantee [*kafāla*], then each guarantor should be associated with a fraction of the loan.

It was at this juncture that the private fund of the orphans became public and accessible to all borrowers wishing to receive loans on the sole condition that they furnished the majlis with enough guarantees (things, lands, properties, or persons). A key element in the procedure was that the borrower had to proceed with his request while "confronting everyone (*bi-muwājahat al-jamī'*)" in the majlis: it is as if everyone becomes a witness in the process so that the purpose of those procedures "in the sight of everyone" was precisely to avoid loans on a one-by-one arrangement. But such measures would have also provided the majlis with a means to filter all applicants and limit the accessibility of the fund to only those whose economic and financial interests did not collide with its own: that was the case, for example, of the Damascus majlis of the 1840s—the first one actualizing the spirit of the reforms—it literally wiped out any competition from the other élite groups that were not included within its narrow circles of power. In the absence of a systematic source of documentation on the proceedings of the orphans fund, it is impossible to know to whom the loans were granted.

Interestingly, at this stage, nothing was yet mentioned as to the interests to be charged on the loans. After all, the purpose behind this whole enterprise

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the people he is serving. Thus, the treasury that was created out of the orphans' properties functioned in a way similar to the iltizām system in that what represented a multazim's or employee's "benefits" or "salary" was cut from the fund itself—and often in percentages that were abusive—so that a clear differentiation between benefits and salary did not occur.

was, *at the same time,* to provide individuals with loans, and increase the fund's volume. But with no interest rate suggested thus far, article eight comes a bit like a surprise: "The surplus [*faḍlah*] and growth [*numuww*] that are the outcome of the profit [*ribḥ*] of the landed properties of the ["orphans"] whose status remained as *'ayn* [that is, were neither sold nor exchanged for money] and kept under the supervision of a guardian, in addition to the growth that results from the profits on cash currencies [*arbāḥ al-darāhim al-naqdiyya*], should be [deposited] in the treasury every six months in the presence of the guardian and majlis. Once all present, the finances should be checked by opening the treasury and verifying the surplus remaining after the money spent [on the livelihood of the "orphans"]." Thus, what kept this fund alive and prosperous were two different sources of revenue: 1) the profit from landed properties that were not sold and whose income was mainly from tenancy contracts; and 2) profits generated from the cash fund itself through charging interest. Even though a direct reference to interest rates was avoided, the situation here was similar to that encountered in the 1852 firman making legal a twelve percent *murābaḥa* on cash loans (*murābaḥa,* a euphemism for interest rate or *ribā,* in case the rate is excessive, will be identified for the first time in article 12 of the present firman). The majlis' policy vis-à-vis the orphans fund now looks a bit clearer. Properties that were thought to generate enough revenues were kept and leased to farmers or multazims; those that were thought potentially less attractive were sold, and exchanged for cash in order to generate more cash. The term "surplus (*faḍlah*)" thus refers to the cash surplus after deducting all expenses, which in this case were obviously the amount needed to sustain the livelihood of the "orphans." (The twenty-per-thousand piasters of expenses to the director, *dallāl,* and courts were deducted prior to depositing the money into the fund.) Nothing was mentioned, however, regarding the majlis' and guardians' own expenses: were they doing all that work for free? Or, was it that, considering that they were presumably elected *ex officio* from élite groups, such funds provided them with sources of cash they badly needed? The other key term is that of "growth (*numuww*)," and as the 1852 firman shows, loans with interest were legally acknowledged from the first period of reforms (a pre-1852 firman even admitted higher rates for the orphans funds, prior to bringing all rates to a single level): but why was no specific rate imposed? Most probably, the fund had to follow the single-rate procedure imposed by previous firmans, even though that remains uncertain. However, not all social categories were equally treated: merchants, for example, were in need of a "strong pledge" and "several guarantors" (article 14).

Loans based on an interest were only one of the major aspects of that kind of funds. Another aspect was charity work. Thus, whenever the deceased benefactor had explicitly requested in his/her will to devote part of his/her

succession to charitable works (*khayr, birr, iḥsān*), such a request, upon the majlis' approval, ought to be respected. What the ninth article did suggest though was that such acts of beneficience could be extended to other charitable institutions not included in the original wills: "any surplus [*fāḍil*] that remains after spending on specific works of charity [identified in a benefactor's will] would go back to the orphans' treasury and spent on building mosques whose waqfs' [revenues] are meager, and on schools, offices, bridges, etc., as well." So, the logic here was in parallel to that of loans with an interest: transcend the private nature of the fund and push it towards something more ambitiously public, in the sense of using that money for something other than the narrow interests of the beneficiaries; and only the guardians of those beneficiaries were consulted—never the beneficiaries directly. However, as with persons and their individual loans, not every public institution was eligible either for charity or loans: thus, treasuries known as *ṣanādīq al-manāfi' al-'umūmiyya* were illegible for such loans (article 14).

While going through all sixteen articles, a perplexing question emerges: How could privately owned portfolios consisting of inherited objects, properties, and lands be legally transferred into the public domain, and managed like a banking enterprise with loans, interests, and profits? One of the many confusing issues that never fully emerges from the text is whether all four categories of "unfit" individuals were "orphans": the text indeed never made such a claim explicitly—not even for the minors; but one wonders why should the state—or local "government"—be "responsible" for the portfolio of an absent traveler? Such a patronage would have been more appreciated in case such a traveler had no family: Should we therefore assume that he was an orphan? And what about a handicapped person with a father or mother and who inherited a property from her aunt: Why should the state feel free to monopolize her wealth? Should we therefore assume that they were orphans in order to make such a monopoly more plausible? Such questions become even more difficult to answer as soon as we realize what was to become of the "orphans"'s money on the long run. Absent travelers' money and properties would become state property if they didn't show up within five years from the opening of their fund, and the five-year period would include all accumulated profits (*murābaḥa*) (article 12): but what if such a traveler had a family of her own? The following article (13) discusses the status of the other three categories and the conditions that would legally establish their right in managing their own portfolio: Orphans have to "prove" that they have achieved the age of maturity (*darajat ar-rushd:* the step of reason, mind, and conscious awareness). The use of *darajat ar-rushd* instead of the more common *sinnu ar-rushd* (legal age, maturity, and adulthood) does probably suggest that the text is not denoting a specific "age" that would automatically

transform a minor into an adult person; the implication here is rather that "maturity" means something more than age (that is to say, a number): indeed, adulthood implies a complex process whereby the minor had to prove him/herself to the community in order to enter once and for all the age of reason (or age of consent). The text requires that legally a minor orphan must have completed his twenty years: the more common *sinnu ar-rushd* is used in this case, thus implying a formal procedure. Such a "proof (*ithbāt*)" should be accepted by the majlis heading the common fund and by other majālis in the province (*majlis al-da'āwī* and *majlis tamyīz al-ḥuqūq*). This does not seem like an easy process and the reason behind such a complexity might well be the fear of losing the fund's money to faked maturity attempts; or it could be that the twenty-year prerequisite was only a preliminary attempt in determining whether the candidate was "mature" enough or not. Moreover, and while the handicapped were not mentioned at all in this article (probably because they were not expected to become normal anytime soon),[65] the madmen/women would expect, like the minor-orphans, a reimbursement once they become "healthy and alert [*al-ṣiḥḥa wa-l-ifāqa:* wakefulness, recovery]," but the text falls short in detailing which criteria ought to be followed while determining "recovery."

A parallel could certainly be drawn between that kind of text and the legal fiction of the death of the kharāj payer (as detailed in one of Ibn Nujaym's "letters"). In both, the death of a person, owner of properties, entailed a de facto state "ownership"; either that person died with no heir, or else his/her will included "immature" beneficiaries (or at least perceived as such); and, in both cases, the state felt free to intervene and impose regulations on its own. In practice, that implied a full or partial seizure of private properties: in one, an irreversible confiscation, and in the other, an open confiscation, subject to negotiation. But considering that the death of the kharāj payer was only a legal *fiction,* that is to say, a juridical technique rationalizing why certain things are the way there are and the legal implications for that state of things—in this case, the massive state ownership of agrarian lands—the alleged "incompetence" of beneficiaries would also be perceived as a fiction of the same order: namely, one of those legal devices that helped in legitimizing the total or partial control

65. What if those handicapped had a family? Why should their money and properties be locked in a quasi-public fund? The text never makes it clear whether those handicapped (or madmen, or the travelers) were also orphans, but it always assumed that they needed help: that is, help from the state institutions. But since it is difficult to imagine that those handicapped would be subjected to this kind of law had they enjoyed a normal family protection, one can only but assume that they were indeed orphans. (The first article probably presupposes, without stating it explicitly, that the deceased person was either the father or mother of the beneficiary and that the latter became orphan as a result of their death.)

of few private properties by the state. Indeed, one is struck by the total absence of preventive measures that would have allowed the beneficiaries (or their guardians) to protest were they not satisfied of the terms of the agreement. But not a single article was devoted to the issue; and, challenging the state and its institutions in court was no easy matter, if not inconceivable.

Even though the orphans fund firman, the latest among those examined in this chapter, goes back to 1866, it strikingly hearkens back to archaic notions of contract and property. To begin with, Ḥanafīs look upon inheritance contractually: the inheritor receives from his benefactor a full contract that links him (or her) to the inherited properties in a way that is to be identical to the one that the benefactor had maintained for himself. The inheritor is thus contractually protected vis-à-vis the inherited properties, which in principle should become his own inalienable properties. In the case of minor orphans, their relationship to their appointed guardian is also contractual—in a way similar to the contractual relationship between representatives and their clients—so that a guardian that mishandles the orphan's portfolio is liable for damages (as a seller is liable for a damaged commodity). Moreover, the appointment of guardians is usually the responsibility of the benefactors and the naming of a particular candidate must be indicated in the will. As we have already seen in one of the Shihābī cases (C 5-2), Ḥanafī courts accepted the same principle of representation, contractual relationship, and liability for non-Muslims too: Bashīr II had been named by his brother as guardian to his nephew's properties, and one of the emir's first actions upon his brother's death was to sell the little boy's properties and buy them for himself in order to compensate for the debt that his late brother had left behind. Since the contractual relationship is between guardian and orphan, the orphan will only be able to sue his guardian and charge him in mishandling his inheritance only when he completes the age of maturity. The handling of an inheritance should thus follow the general Ḥanafī principles in terms of an efficient management, meaning that the properties should not only remain as beneficial as they were but even more so if possible.

One has therefore to assume that all those "orphans" (meaning all four categories) had already their appointed guardians in legally binding contracts, and that it was indeed one of those privileges enjoyed by benefactors to appoint guardians they trusted. The 1866 firman thus breaks with the all too commonly accepted practices at several levels: first, by not accepting the guardians that might have been appointed by the benefactors, and requiring instead that a special majlis handles the appointment of all guardians (article 4); and second, and more importantly, the orphans and their guardians were not permitted to use their properties as they please, namely as *privately* owned and for their own purposes. Since their portfolios had been transformed into

quasi-public funds for lending and circulating money, their properties are not "theirs" anymore—at least not until their status changed. On both counts, then, sultanic legislation breaches Ḥanafī practice and imposes its own normative rules that were alien to what the populations had been accustomed to. In the absence of detailed empirical information on the volume of such funds, one can only speculate that all kinds of "orphans" portfolios must have been large enough so as to prompt the state towards new measures. In effect, the situation of all such "orphans" might be compared to waqfs in general in the sense that they all became a means to protect private properties either from fragmentation through intestate inheritance or from confiscation by local or state authorities. Large chunks of properties were thus kept out of circulation for their better protection and safety, and the firman was probably no more than an attempt to break such a deadlock.

The heart of the firman comes in conjunction with the earlier 1852 firman which probed a 12 percent interest rate for loans completed between private parties and legally sanctioned by the state on the basis of that newly established interest rate (C 10-2). The 1866 firman, which intended to establish a loan policy out of the orphans' deposits, assumes the existence of specific interest rates but never identifies them as such. The later firman, however, was stringent in terms of sureties since it required something in return for every loan, either a land or a guarantor. In short, private properties and funds had been open for new contractual types with anonymous people, and it is the legal implications of such an action that is our concern here. To begin with, since the whole telos of the enterprise had as a declared purpose of lending money upon interest, upon which legislation was such an action based? Certainly not Ḥanafism which neither encourages such loans nor provides any clear legislation regarding interest rates and the like. One should therefore look at both the 1852 and 1866 firmans as examples at how sultanic (state) legislation steps in to form new contractual forms hitherto nonexistent—at least not explicitly as such. But it does so aggressively: not only by bypassing Ḥanafism altogether, but also by opening up blocked properties to its new contracts. We therefore encounter that desire to provide new contractual forms that would accept types of transactions that the socio-economic realities have made more urgent. That was too the purpose of many of the fictitious litigations that filled the sharī'a courts: they basically signaled the passing of properties from their family-based ownership to one in which the property would be the sole possession of an individual.

The purpose of this chapter has been to explore the relationship between Ḥanafī practice and sultanic (hence state) legislation, and what emerges for that "transitional" period of the Tanẓīmāt is the coexistence of several jurisdictions, or what Max Weber would have called "law communities," the autonomous

jurisdictions of which overlapped.[66] In fact, even though Ḥanafism and sultanic ordinances had a lot in common, they nevertheless remained autonomous, if not in competition with one another. Sultanic legislation, being promulgated by the state and without ties to a long tradition, had the upper hand, and, whenever necessary, it imposed its own normative values on issues the fiqh stumbled upon and thus became inefficient. One such instance is that of lending money upon interest. On two occasions, the state had first to fix interest rates and then create additional lending facilities from private funds, both of which would have been unimaginable in sharī'a law. But if the state had the upper hand and decided which laws ought to be the most effective—a policy that became even more aggressive in the 1860s and later—it is probably because it looked upon all those sub-systems as "special laws" that served the purpose of maintaining various "communities." The time had come when those "special laws" had to give place to more broadly defined state laws that would bring all such "communities" together under one set of jurisdictions. But does that imply that the normative values proposed by state legislation would be the ones to predominate so as to eclipse all religiously based systems? In the case of the 1866 firman, the vested rights of the orphans, which were granted by sharī'a law, have been jeopardized by the firman itself: what was a settled right of absolute ownership has been transformed into a quasi-public fund without the consent of the "orphans," their relatives, or guardians, none of whom, had they wished to do so, could sue the state institution that was created out of their own private properties. Would therefore the newly created norms under state legislation be apprehended in lieu of the preexisting ones? The question is not limited to the firmans we have explored in this chapter, but to the entire policy of the reforms, and, indeed, to all the newly promulgated laws that those societies have witnessed since the breakup of the Ottoman Empire. In short, new laws and regulations do not necessarily imply a related set of internalized normative values, and the actualization of norms with no deep roots in society is the greatest challenge that legislators and bureaucrats face whenever structural changes have been attempted.

66. Max Weber, *Economy and Society*, translated by Guenther Roth & Claus Wittich, 2 vols. (Berkeley: University of California Press, 1978), 2:697.

Chapter 11
The phantom of the victim and the triangle of debt

> They looked. Murderer's ground. It passed darkly. Shuttered, tenantless, unweeded garden. Whole place gone to hell. Wrongfully condemned. Murder. The murderer's image in the eyes of the murdered. They love reading about it. Man's head found in a garden. Her clothing consisted of. How she met her death. Recent outrage. The weapon used. Murderer still at large. Clues. A shoelace. The body to be exhumed. Murder will out. (James Joyce, *Ulysses,* p. 102 of the 1971 Penguin edition.)

Fiction is the perfect crime

> A man rushes out from a house with a knife in his hand, he is covered with blood, moving swiftly, and signs of fear are visible [*ẓāhir*] [on his face.] People then entered the house immediately at that time, and found a slaughtered human being at the same time [*bi-dhalika al-ḥīn*][1] who was stained with his own blood. And there was no one in the house except that person who was [leaving and] caught in that situation: he becomes a suspect [*yu'khadh bi-hi*] since there are visible indications [*huwa ẓāhir*] [of his culpability.] No one would dare [*lā yajtarī aḥad*] claiming that he did not kill [the man in the house], and assume that the dead person slaughtered himself, or some other man [other than the suspected one] killed him, then climbed the wall, and ran away. That is a remote possibility which is not acceptable because it was not created by some evidence [*dalīl*] such as the possibility that the witnesses might have lied.[2]

This passage, by a leading Egyptian scholar of the first few decades of Ottoman rule, is striking in how little was required prior to declaring a suspect guilty.

1. Probably meaning as soon as they entered the house.
2. Zayn al-Dīn Ibn Nujaym, *Rasā'il Ibn Nujaym* (Beirut: Dār al-Kutub al-'Ilmiyya, 1980), 357.

In effect, it is fair to say that the suspect was declared guilty instantaneously: the knife, blood, fear, movements, and above all, the presence of a slaughtered body in the vicinity of a suspect running away, were more than enough to move swiftly from the status of suspect to that of culprit. *Ẓāhir,* or "the external manifestation" of an "event," a term repeated twice in the passage, is a key component in the context of crime: evidence and indications of guilt [*adilla*] must be visible to the eye; and it is the eye of the beholder that discovers the links between the object of crime and the subject who committed it. As in all sharī'a court hearings, very little room, if at all, was left for direct- or cross-examination since witnesses only gave support to and repeated their party's statements. But if no homicide investigation did progress much beyond an elementary process of witnessing and accumulation of evidence, it was more because penal law had no interest in the "motive" of the crime as such. In effect, the "motive" came into the picture only through the tool-of-killing. In other words, the suspect was not a subject with obscure motives and passions created by a troubled psyche, but an individual who either committed the crime or not. What therefore pushed for a final decision making were external indications (signs or signifiers): the tool of the crime was one of them; and a knife, as the one in the hand of our suspect, being a sharp metallic object not designed specifically to kill but at least to cut, is one of those objects which, all by itself, could easily inflict guilt upon a suspect (a wooden stick was less reliable for that matter). The same Egyptian jurist, Ibn Nujaym, noted on another occasion, when discussing the Ḥanafī "general rules (*al-qawā'id al-kulliya*)" that,

> punishment is in relation to the killer's intent to kill. But they said: since intent [*qaṣd*] is an internal motive [*amr-an bāṭini-yan*], then it is the tool [of killing] that should be considered as [an indication for] motive [*uqīmat al-ālat maqāmi-hi*]. So that if the culprit killed his victim with an instrument that dismembers the body parts [*yufarriqu al-ajzā'*], then the killing is looked upon as intentional. But if he killed his victim with something that does not dismember the body parts, it would then be looked upon as quasi-intentional, and, as the great imām [Abū Ḥanīfa] stated, there should then be no punishment. As to error [*khaṭa'*], it consists at targeting something lawful [*mubāḥ:* permissible], but a human being was wrongly aimed at instead.[3]

Interestingly, Ibn Nujaym was discussing on that occasion the first of his "general rules," the one stating that "rewards come only with good intentions [*lā thawāb illā bi-l-niyya*]."[4] Considering that the "general rules" constituted

3. Zayn ad-Dīn b. Ibrāhīm Ibn Nujaym, *al-Ashbāh wal-naẓā'ir* (Damascus: Dār al-Fikr, 1986), 20.

4. Ibn Nujaym, *al-Ashbāh,* 14.

the most ambitious attempt by several generations of jurists up to the Majalla to establish abstract legal rules that would tie up the several branches of Ḥanafī fiqh together, from the *'ibādāt*, and *mu'āmalāt,* up to torts and crimes, the crime example in the above passage represented a "case" for the more general "rule" regarding *niyya.* Having first stated that for all branches of Ḥanafī practice, *niyya* was an integral part of any practice, be it a contract, a transaction, or a crime, Ibn Nujaym then argues that when a crime occurs, intent would only be detected from the weapon itself: since the intention behind an action is by definition something hard to know and assess because it is "hidden" and "internal," the only way to bypass such a difficulty is to associate the act and its meaning with the instrument of the crime: that alone would be enough evidence, and the weapon would become the objective signifier that would establish whether an act was intentional or not.

The tool-of-killing as corpus delicti

Homicides, therefore, rather than forming a category of their own, shared a similar dynamic with property and contract cases dealt with thus far, that is, once we begin to look at homicides as "private torts" whose "compensation" ought to be settled between the various parties, then the similarities with contract become more visible. In fact, once cases are looked upon in terms of their relation to their object (property, contract, succession, crime and tort), and how a case constructs itself around that object, the similarities become even more evident. For one thing, in the Islamic and Ottoman legal systems, the "object" itself was not what was open to investigation: judges did not care much about the current status of a disputed property, or a body found lying in the street, since "evidence" did not come from the object itself (as would be the case in modern scientific research or police investigation) but from the constructed evidence as presented by the disputants, their representatives, and witnesses. Which raises the issue, essential throughout this study, of the relationship between statements and facts, language and reality: if the connection between language and reality is only a modern question of the *Aufklärung,* what was then the status of language in societies that did not necessarily operate within the dichotomy fiction/reality? A preliminary answer came up upon investigating the linguistic roots of custom:[5] since a customary practice, from the fiqh's point of view, is solely denoted by its linguistic component, language is hence an ideal medium for contracts and obligations

5. See *supra,* Chapter 1 on custom.

provided that each utterance/statement is referred to its "true meaning" (*al-ma'na al-ḥaqīqī*)—the metaphorical meaning imposes itself only as a second alternative. Statements therefore only denote—or are rather of interest to the fiqh only in so far as they are limited to—the contractual side of a customary practice. Since contracts, however, are either valid or invalid, contractual statements, in turn, share the same status depending on how and where they were stated (some contracts need to be completed in the presence of a majlis). The validity of contracts, however, rather than opening itself to social and historical contingencies (or "events") was protected by layers upon layers of traditions; and the only breach here came through customary practices reduced to their linguistic components. Once the latter were integrated within canon law (that is, an "equivalent" legal language was adopted), the circle was closed all over again, and the historical events that made such an integration possible were barely visible in the discourse of the fiqh. A statement therefore related to a field of enunciation, was validated within that field rather than, say, confronted to some "external reality."

Findings of fact

All cases dealt with thus far could be described as "typical": they have nothing unique as such, and, indeed, are very common and randomly chosen among hundreds of other identical cases. Most nineteenth-century court documents easily fall within this predictable category: whatever the complexity of the case, chances are that there is nothing unique to all the twists and turns. In fact, by the nineteenth century, if not earlier, cases obeyed to a dozen of specific "formulas," some as procedural fictions (see Table 2-2 *supra*), so that judges had only to fill in the variables. In other words, there were few "hard cases"—and those usually required a muftī's fatwa—and judges were not expected to act as mujtahids (even though they were legally permitted to exercise *ijtihād*): when faced with an unusually difficult situation, judges typically sought a muftī's opinion.

The few crime cases dealt with in this chapter are, however, altogether different from the other examples in this study. First, they were very rare—so rare that one might think that cities like Beirut and Damascus lived in complete peace.[6] In fact, the number of homicide related cases typically varies between

6, By contrast, Cairo, in that respect at least, was much more vibrant, see Rudolph Peters, "Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi," *Islamic Law and Society* 4, no. 1 (1997): 70-90. Cairo enjoyed much more impressive penal procedures and had maǰālis specifically devoted to that purpose. The first modern penal code, under Muḥammad 'Alī, goes back to 1829-30.

zero to two per sijill (comprising on average at least 500 to 600 cases). Second, not a single case prompted an "investigation" from the judge to the extent that one wonders whether anything like an "investigative procedure" did exist at all, and, if anything procedural followed, in which domains was it applied? Third, since investigations were out of question, homicide cases (or others with a minor or major physical damage) were primarily meant to "reconcile" people and collect damages (often in the form of an inheritance) rather than punish the culprits, either by accepting the defendant's innocence, or if he[7] was to be found guilty, the *diya*'s nature and amount (that is, blood money) had to be evaluated and specified prior to any reconciliation. In other words—and this is the main point of this chapter—the basis of such cases was primarily *contractual:* that was indeed an unusual form of coming to terms with a murder's mystery, which by all means did not simply amount to establishing the *diya'*s value. In effect, and this applies to the Beirut cases in particular, a settlement was reached whereby the plaintiff(s)—that is, the victim's "kin"—would be acknowledged as the sole legitimate inheritors of the victim's succession (*tarika*), in return for the plaintiff(s)'s indirect acknowledgment that the accused (defendant) was indeed innocent.

Working with sharī'a courts crime cases hence turns out to be a different experience,[8] but the similarities with the great majority of land and property cases, whose purpose was to bypass a rigid notion of contract, is also striking. In fact, the lack of independent investigation, the way witnesses testified in court, and the overall theatrical (fictitious) ambiance of those cases, makes them quite familiar. The reconciliatory nature of crime cases transforms hearings into short episodes that on average are not much longer than sale or tenancy contracts. An understanding, therefore, of the nature of homicide in the context of sharī'a courts needs to take account of all those limitations: rarity of cases, their conciseness, the lack of investigation,[9] and the fictitious form of the hearings. As in the previous chapters, this study on crime is based on a three-level reading from the fiqh texts, the sharī'a courts, and the local city councils; and the overall aim is to associate all textualities around a set of premises: 1) Homicides (and more generally crimes) were a private affair: there was no public prosecution office—or a *niyāba 'āmma,* as they are referred to today—and a crime—or its repercussions—could receive the

7. Even though women in principle were not ruled out from committing a crime and hence showing in the role of defendant, I never came across such cases. The reason will become more obvious as our discussion on crimes progresses.

8. On the Islamic law of homicide in general, see J. N. D. Anderson, "Homicide in Islamic Law," *Bulletin of the School of Oriental and African Studies* 13 (1951): 811-28.

9. This seems to be the case in the Moroccan Sharī'a courts, see Berque, *Essai,* 105: "Le cadi n'a à aucun moment de pouvoir d'enquête."

mild attention a judge's court only when one of the victim's "relatives" filed for a lawsuit. A culprit was not supposed to have a public persona either: the "public" had no power to decide whether a crime was moral or immoral, good or bad; in short, crime stories were not disseminated into society and remained private, and criminals were kept invisible and their stories were not shared in public. 2) Judges were never concerned with punishments but only with the "repercussions" of a crime that became the subject of litigation: generally speaking, either the accused (defendant) had to be cleared, that is, found not guilty, or if he was found guilty, a settlement had to be worked out—usually in the form of an acceptance of a blood-money payment by the killer, or his *'āqila* ("professional milieu," see below), or the "next of kin" (*walī al-dam*) of the victim. 3) Since judges never punished, and since an "investigation" was limited at most to sending an "explorer [*kashshāf,* or *mustakshif*]" to study the depth, size, and nature of the wound(s) on a victim's body, it is quite possible then that the only authority that punished was the wālī or a body of associates close to him (the *dīwān,* for example). Such a possibility is reinforced by the minutes of the Damascus majlis in 1844-45 which adjudicated over a few crime and tort cases and decided on specific punishments; but no thorough "procedures" seem to have been followed. 4) Since crime cases were not processed by means of formal investigative procedures, the guilty or not guilty verdict was solely based on the basic rule of "evidence is on the plaintiff, and oath is on the denier [*al-bayyina 'ala al-mudda'ī wa-l-yamīn 'ala man ankara*]"; this implied, in practice, that the accused (defendant) took an oath to establish his innocence, and this only in case the plaintiff made a formal request for his opponent to do so, but for reasons that will become evident later, plaintiffs usually refrained from doing so. 5) Many such cases established the innocence of the accused; indeed, it does seem possible—even though such cases were brought up by one of the victim's "kin"—that the whole ritualized "hearing" was staged so as to bring forth the defendant's innocence—probably as part of a "deal" between the two parties; moreover, at times, a time lag of several months up to a few years between the alleged crime and the hearing itself marks some cases: that could be an indication that the sole purpose of such hearings was one of honor: we need to keep in mind that the "accused" was not associated with a particular murder the day of the lawsuit, but probably much earlier—he became an "accused" by the relatives of the victim, and, at some point, a common decision was made to clear his name—in court, of course. Finally, 6) what all this amounts to is a process of redemption for the accused—a settlement of honor—so that he was no longer targeted by the victim's relatives for revenge or blood money, and, in some cases, the plaintiff(s) established themselves as the sole inheritors of the victim's succession.

Even by modern Middle Eastern standards, the nineteenth century looks far away in time and space; this is particularly true of torts and crimes, their social meaning, and the court procedures associated with them. In fact, the majority of legal systems today preoccupy themselves, when confronted with crime, in applying routinely accepted procedures that would help in identifying the criminal, assessing the punishment, and at times collecting damages (even if the alleged criminal openly confessed to his/her crime, all procedures must still be followed). Thus, the nature of the crime, the weapon used, and the damage inflicted on the body of the victim, all matter for a single purpose: to find out the perpetrator in order to determine a "just" punishment. The logic of modern systems would not have been possible had they not been modeled on the fiction of the subject-object paradigm of the natural sciences and their cognitive assumptions. There is an object to be known—the crime—committed by a social actor; those investigating a crime are also in turn actors who, like scientists researching in a laboratory, apply objective methods in seeking the truth about the object to be known. Thus, a fundamental cognitive assumption consists in positing the crime as an "object" to be known, that is, as an entity "outside" the subject, and knowledge thereof of that object would be constructed independently of normative validity claims: in other words, whoever the investigative subject is, knowledge of the object ought to be independent of the knowing subject.[10]

The body, its parts, and their value

To understand the essence of crime in the sharī'a courts, a very different fiction needs to be imagined—both in its cognitive and normative values—from what we are accustomed to.[11] We have to imagine a system whose truth value was not based on a subject-object paradigm; hence a "crime" did not constitute an "object" open for inquiry; and finding out the criminal was not a major obsession; indeed, the system was more concerned in assessing damages in terms of the normative expectations of the parties involved; which left the latter, if they wished to do so, to retaliate on their own, or to seek peace, or else request blood money. Since the Ḥanafī tradition neither operates

10. On the most common concepts of crime and punishment in contemporary western societies, see David Garland, *Punishment and Modern Society* (Chicago: The University of Chicago Press, 1990).

11. For a survey of sharī'a penal law, albeit one that is flawed in terms of its historical evolution, see Muḥammad Salīm al-'Awwā, *Fī Uṣūl al-niẓām al-jinā'ī al-Islāmī*, 2nd ed. (Cairo: Dār al-Ma'ārif, 1983 [1979]). This survey, like many others that addresses itself to a contemporary Arab and Islamic audience, does not debate the complex issue of the historicity of penal law. It rather seeks to "update" penal law to modernity.

within a precise concept of penal law, nor does it separate between offences committed against a person's body and those against a property—both would be classified as "usurpation (*ghaṣb*)"—the body itself, as long as the soul (*nafs*) has remained unharmed, metamorphoses into an object for compensation. Each part of the body, therefore, has a "price," that is, is subject to damage assessment, and as such legally achieves the status of *māl mutaqawwam,* a tangible object whose exchange is legally protected. In a classical case of property usurpation, the usurper must return that property to its owner. This is why when it is a question of malicious damage only, such as theft, Ḥanafīs request restituting the loss, but without penalty: it falls under usurpation. In the case of a body, however, since the damaged part cannot be returned, an equivalent *māl* must be returned to the victim. In Ḥanafī literature, the bulk of the chapters on penalties, delicts, usurpation, and punishment, address mostly the issue of compensation: its value, and by whom and to whom it should be paid.

Strangely, once the crime in its totality ceases to be an object of investigation with the purpose of finding out the perpetrator and the motives behind the act, the legal literature becomes overburdened with the smallest possible details over the nature of the weapon used in the act of aggression, or the damages inflicted upon the victim's body, or who among the "relatives" should enjoy the right to retaliate, or else to receive the corresponding blood money. Thus, the weapon itself as an instrument—or rather the *use* of a specific weapon (whether of a metallic or more malleable substance)—would in itself constitute enough evidence that establishes the *motif du crime,* or rather the intention of killing, the *qaṣd.* Similarly, the body is not abstracted from its constitutive parts, that is, perceived in its functionality, but divided into unequal regions with unequal parts and organs so that each part could be assessed differently depending on the specific nature of the damage.

> You should know that there is a second kind of *māl* [*res in commercio*] as compensation [*badal*] for the human body or the meanings [*ma'ānī*][12] associated with it, such as blood-money value [*māl al-diya*]. The [body's] members are of four parts: [1.] three that are single: the nose, the tongue, and the penis; in addition to the meanings that act singly on the body [*afrād fī al-badan*]: the brain, the soul, smelling, and tasting; [2.] members in pairs: the eyes, the ears that stick out, the eyebrows, the lips, arms, woman's breasts,[13] the labia

12. In the fiqh, meaning (*ma'na*) is the "mental image" associated with an utterance/statement (*al-ṣūra al-dhihniyya li-l-lafẓ*). In this case, the body is associated with meanings such as blood money.

13. By contrast, men's breasts were not categorized: could it be because they were perceived as of no specific "utility"?

> [*untha-yān*],[14] and the legs—all [could be subject for compensation for] blood money; one of them, [the eye, is compensated for] half [the blood money] and equivalent to each of the four edges of the eye, so that each edge [*shafr:* edge of the eyelid] is one-fourth of the blood-money; [other organs should be divided into] ten parts [*a'shār*]: the fingers of the hands and those of the legs, so that each one is equivalent to one-tenth of the blood-money.[15]

Rather than subsume all "damage" under one broad category, Ibn 'Ābidīn instead assesses the blood money for each categorized organ separately. Besides the broad division of organs into singles and doubles, implying that doubles should always be evaluated in terms of their parts, the remaining organs follow a case-by-case method: that is, each individual organ is evaluated in terms of its function and importance. Thus, in case the nose is damaged, it does make a difference whether the damage is purely aesthetic and hence does not affect the function of smelling, or whether the cutting of the edges (*al-mārin*) with the nosepiece has damaged the function of smelling: in the former case, only "one blood money" should be paid, while in the latter, it is twice the same amount; the reason being that the victim would have lost all or part of her nose, in addition to the faculty of smelling: these are two different things because "smelling is not in the nose," but rather "the nose is designed to absorb the smells and transfer them to the brain,"[16] so that smelling is associated with a second organ—the brain. Similarly, since the penis combines several functions, the *diya* has to be assessed accordingly. There are therefore organs designed for one thing—smelling—but whose functionality is linked to another organ, while others share several functions: in both cases, blood money could be doubled or tripled.

Weapon determines intent

In the same way that the body is not perceived in abstraction from its organs (individualized parts) and each organ is in turn assessed differently, similarly, the "weapon" of the crime is not an abstract object since each "weapon" represents for jurists a different set of problems. In fact, and in contradistinction to modern procedures that do not bother with *how* a person was harmed or killed as the crime's telos, Muslim jurists had to establish

14. The male organ was referred to as a single organ, as *dhakar,* literally "male" (still used in modern Arabic as an alternative to the more direct *qaḍīb*); by contrast, the woman's labia were classified, like the lips, as "an organ in pairs" and referred to as the *untha-yān,* literally the "two females."

15. Ibn 'Ābidīn, *Radd,* 6:575.

16. Ibn 'Ābidīn, *Radd,* 6:575.

graded scales for the weapon used, the damaged part of the body, and the blood money to be refunded. This is particularly true of "homicide [*jināya,* pl. *jināyāt*]," "due to its importance and because of its connection with the souls [*nafs,* pl. *anfus*]."[17] This in itself is enough to pose *jināya* as one of the greatest sins, practically within the same category as blasphemy, even though the act of killing as punishment (for example, stoning), which is legal, does not fall within the category of sin.

In homicides (and more generally, crimes), what the legal system was concerned with was whether the act of killing was premeditated, that is, was the act *'amd*? The notion of *'amd* as premeditation and deliberately planned action is associated with *qaṣd,* intent(ion), purpose, and design. The purpose is what pushes an individual towards a premeditated act of killing, but since purpose is usually taken to be "subjective" or "hidden [*bāṭin*]," the jurists were more concerned with *'amd.* This does not mean, however, that premeditation is necessarily "objective" or "visible [*ẓāhir*]"; it is rather the association of premeditation with the weapon used (*ālat al-qatl:* the machine of killing) that determines whether the act was premeditated or not. In other words, the objective criteria were established by the jurists on the basis of the weapon used: this was enough in itself to determine the "degree" of premeditation in an actor's action to the point that the internal subjective motivations were of no real concern for the legal system.

> Premeditation is [identical to] purpose [*al-'amd huwa al-qaṣd*] and the association is made only in relation to its evidence [*dalīl*],[18] and the latter is furnished by the killer's use of his own weapon [*ālat-ahu*], so that evidence stands out in lieu of what needs to be proved [*uqīma al-dalīl maqāma al-madlūl:* evidence replaces intent].[19] What points to evidence [*dalā'il*] therefore becomes a legal proof whose knowledge is based on assumptions [*al-ma'ārif al-ẓanniyya al-shar'iyya*]. [Thus, shar'ī law] makes it plainly clear that punishment [*quṣāṣ*] should be applicable even if the witnesses did not mention a premeditated purpose.[20]

17. Ibn 'Ābidīn, *Radd,* 6:527.

18. Broadly speaking, *dalīl* could be a sign, an indication, a mark, or denotation; in short, it is what the science of semiology refers to as the "signifier." In this context, however, *dalīl* is closer to evidence and proof (*bayyina*) since the use of a particular weapon is enough proof in itself to establish whether the act was deliberate.

19. *Madlūl* has several equivalent terms that all cluster around "meaning": sense, signification, intent, and denotation. In this context, it is the meaning of the act in its totality which also includes the (subjective) intention of the killer.

20. Ibn 'Ābidīn, *Radd,* 6:527.

Ḥanafism thus plainly distances itself from intention altogether and from the "subjectivity" of the killer's motives: no visible interest is manifested towards the *motif du crime*. Instead, what is looked upon are external signs of premeditation that are directly associated to the weapon of the crime. In fact, those external signs—such as the use of a specific weapon—are enough per se to override testimonies of witnesses that could not determine premeditation with certainty. Hence, unlike other areas (such as contracts and obligations), the distancing is even from what witnesses have to say: it is thought that witnesses are unable to determine for sure whether the alleged criminal act was premeditated or not, and what they effectively saw would at best only *describe* the crime (Ibn ʿĀbidīn goes as far as to suggest that judges should refrain from asking witnesses whether the crime they witnessed was premeditated or not).

If belief in "external signs" was the sole criteria, what did those signs consist of? They consist of, basically, two related matters: the weapon *and* the substance of which it is made. Actually, and to place things in their right order, substance "precedes" everything else: in other words, the degree of "hardness" of the substance could in itself be enough "evidence" for premeditation. For example, metal is more decisive than, say, a rope, and more malleable substances play a less evidentiary role than harder ones. Since the weapon per se—or rather its *substance*—constitutes in itself enough evidence to establish premeditation, metal becomes the primary de facto standard in establishing that a *ʿamd* intent was in the works from the moment the culprit chose his weapon: "a *ʿamd* implies premeditation for the purpose of killing with a metal such as a sword, a knife, a lance, a dagger, an arrow, and a needle... whether the result was death [*halāk*] or not."[21] In fact, metal became such a "reliable standard" from the early days of Ḥanafī fiqh to the point that Shaybānī did not even see it was necessary for pondering about a wound caused by a metallic object in order to establish that the "aim was killing [*waḍʿ li-l-qatl*]." In other words, if the presence of a wound or its absence does not in itself establish anything decisive, it is because metal has been established as the absolute objective signifier in determining the *telos* of a crime. Had the fiqh gone the other way round and opted for *intent* instead of *telos,* it would have placed judges in the miserable position of waiting for their accused to utter a word explaining *why* they did what they did—a situation that Michel Foucault described very well for nineteenth-century European homicide trials.[22] To be sure, such a shift

21. Ibn ʿĀbidīn, *Radd,* 6:527.

22. Michel Foucault, "L'évolution de la notion d'« individu dangereux » dans la psychiatrie légale du XIXe siècle," in *Dits et écrits, 1954-1988, III: 1976-1979*, edited by Daniel Defert and François Ewald (Paris: Gallimard, 1994), 443-464.

would have required a different cognitive and normative values, which would have centered on a knowing subject in accordance with a specific (scientific) knowledge of that social and psychic individual. Instead, the construction of objective criteria in Ḥanafī literature avoided such tropes as "subjective intent": the *ẓāhir* over the *bāṭin,* and the *alfāẓ* over the *ma'ānī,* or the utterances of the disputants, their representatives and witnesses, were all perceived as objective signs within a linguistic system, rather than as speech acts with confusing intentions, and whose aim would be the grasping of an objective reality. But the bracketing of intent, meaning, and a subjectively motivated telos, and the priority accorded to objective signifiers also manifests a desire to forgo processes of linking signs with their contents and meanings. The fiqh was therefore able to bypass such a process, and signs—or signifiers—which acquired a meaning of their own, independently of any historical event, were transformed into absolute evaluative—if not normative—criteria. The case of metal is quite significant not only because it established a reliable criteria, but also by becoming an analogic reference for future technological novelties. Thus, for example, the use of firearms became by analogy to metal enough evidence that killing was indeed the sole purpose: "Killing with a rifle charged with a bullet is an act of *'amd* because it is made of a metallic substance [*min jins al-ḥadīd*] that wounds, so a punishment should be set accordingly; but other [jurists], such as Ṣaḥḥāwī, were of the opinion that as long as [the rifle] did not produce any wound, then there should be no punishment."[23] And when witnesses were brought to a homicide hearing, "it was stated in [Itqānī's?] *Sharḥ al-kāfī*[24] that witnesses should not be asked whether [the victim] died from this [weapon] or not; the same applies when they testify that he was hit with a sword prior to dying, even if no mention was explicitly made that the act was *'amd* because the latter is the intention inside one's heart [*al-qaṣd bi-l-qalb*], and this is taken as unreliable [*lā yūqaf 'alay-hi*] because it is part of the *bāṭin;* but [the *'amd*] is known from its own sign [*dalīl*], namely hitting [someone] usually with a deadly weapon. But it remains safer [*aḥwaṭ*] if they witness that [the victim] was killed on purpose [with a deadly weapon] and that he effectively died [as a result of this aggression]."[25] In other words, since the use of a deadly metallic weapon is enough per se to establish the culprit's guilt, there is no need to push the witnesses further with additional questions to pull the last words from them on the *cause* of the death: Was it specifically caused by that same weapon? Or was the weapon and the way

23. Ibn 'Ābidīn, *Radd,* 6:528.

24. The author of the remaining fragment of *al-Kāfī*'s manuscript is usually identified as al-Ḥākim al-Shahīd (d. circa 400/1009).

25. Ibn 'Ābidīn, *Radd,* 6:570.

the victim was hit enough in themselves to provoke a premature death? Even though it was considered "safer" that witnesses were asked and did reply to such questions, judges should refrain from doing so on their behalf: no one knows what witnesses might end up confessing, hence provoking further confusion in the hearings. Such a limitation imposed upon the witnesses either in terms of questioning or utterances should be associated with the general rule on witnessing: namely, that the purpose of witnessing was to repeat and confirm what one "party" had already claimed against the other party; hence, witnesses' utterances were to be limited at all cost. In other words, by means of valid normative rules, the system attempted to marginalize the facticity of unpredictable linguistic communications. In the case of criminal hearings, the rule that established that the use of a metallic weapon implied premeditation, was to take precedence over confusing if not contradictory facts, and hence assimilate any factually linguistic element that might have contradicted the normatively accepted rule. On the other hand, and due to the seriousness of a premediated killing, and because it was as great a sin as illicit sex, theft, and *ribā,* and as serious as blasphemy against God,[26] there were special rules to be applied only to homicide witnessing.

> You should know[27] that the testimony of women, in an act of unintended killing [*al-qatl al-khaṭa'*],[28] and in a killing that does not necessitate punishment [*qawad*], is accepted [in equality] with that of men. And the same applies to a testimony based on another testimony,[29] or when a judge reports to a colleague, because the purpose [of such litigations] is the [acquisition] of *māl.* And if someone witnesses with justice against someone else for committing a killing, the [alleged] culprit should be imprisoned; but if [the latter] comes with a witness [that proves his innocence,] he should then be set free. The same also applies whenever a virtuous witness [*shāhid mastūr*] [provides evidence] to a premeditated killing: [the accused] should be imprisoned unless the justice of all witnesses [*'adālat al-shuhūd*] proves otherwise; and the same applies to errors on visible matters [*khaṭa' 'ala al-aẓhur*].[30]

When it came to homicide, and in particular a problematic—non-intentional—killing (one associated with a *shubha*), the process of witnessing was altogether

26. Ibn 'Ābidīn, *Radd,* 6:529.

27. "You should know (*i'lam*)," like "I say (*aqūlu*)," usually stands for Ibn 'Ābidīn's own opinion on a specific issue. The opinion is in principle posited as an act of *ijtihād,* or as the outcome of an adjudication between several conflicting opinions.

28. This is when the victim was not deliberately killed: the culprit intended to hit his victim but not to kill him/her. Again, it is the weapon used that establishes definitive evidence.

29. That is, it should be accepted like any other first-hand testimony.

30. Ibn 'Ābidīn, *Radd,* 6:568. It is not clear what *aẓhur* stands for since the plural of *ẓāhir* is *ẓawāhir.*

more relaxed: men and women's testimonies were accepted on an equal basis, proxy testimonies were also accepted, and judges were requested to seriously take into account what one of their colleagues transmitted to them in writing. Two major reasons stood behind this kind of relaxation: 1) a non-intentional (false) killing was established by confirming that the accused did not use a weapon with an intention to kill, simply because it was not designed for that kind of action in mind; and 2) once the accused was cleared from any intentional wrongdoing, damage had to be assessed by the court and a compensation was to be paid to whom the damage was inflicted upon: in other words, *māl* was to be exchanged for the damaged organ(s), or the "edges [*aṭrāf*]" as they are referred to in the legal texts, in contradistinction to the "soul [*al-nafs*]" whose destruction ought to be reprimanded with the most severe punishment. Thus, the important point here, is that "the body's parts fall within the domain of exchangeable things [*al-aṭrāf fī ḥukm al-amwāl*]."[31]

Value of the body and its parts

Ḥanafīs believe that body damage could be assessed as *māl,* that is, it achieves the status of a commodity that could be exchanged for another commodity. More precisely, the damaged part(s) of the body, or the body as a whole (in case of homicide), could achieve the legal status of *māl mutaqawwam* if—and only if—the "relatives" of the injured party agree for a peaceful settlement with the culprit (or his *'āqila*). What needs to be therefore analyzed is the logic of the process that ends up "equating" a damaged part of the body with an exchangeable thing (*māl*). The following stands as the general assumptions of the penal system: 1) a person who has intentionally inflicted damage—either total or partial—on another body should be subject to punishment; 2) if the victim died, the punishment could be transferred to the victim's "kin" who would benefit from a legal right of retaliation; and 3) the next-of-kin could seek a peaceful settlement with the culprit or his *'āqila* (the "professional milieu") and request a *māl* retribution.

As noted earlier, the damage inflicted upon a person's body could either be total—that is, destroying an individual's most precious entity, the "soul [*nafs*]"—or partial, damaging part(s) of the body's organs—or the "edges [*al-aṭrāf*]," as referred to in the fiqh (that image perceives the *nafs* as the center, while the organs are edges). Such a damage is of course the result of a fully premeditated action (we do not hit someone on the head with a sharp weapon

31. Ibn 'Ābidīn, *Radd,* 6:558.

without being conscious of the consequences of such an act), but jurists had to tackle the issue of whether the killing of a person necessarily implied premeditation, and the answer was obviously "not necessarily." In fact, Ḥanafī practice created the category of "quasi-mistake [*shibh al-khaṭa'*]"; and since the use of a specific weapon—in particular metallic ones—was enough evidence in itself to establish premeditation (*'amd*), it was safe for a judge to conclude that the used weapon was, so to speak, the "wrong one" because the intention was only to harm rather than kill, and the victim died "by mistake." Thus, the notion of "quasi-mistake,"

> includes [on the one hand] deliberate intent [*al-'amdiyya*] because the actor intended inflicting harm [*qaṣada al-fā'il ila al-ḍarb*], but [on the other hand,] [it is associated with] the implication of a mistake [*ma'na al-khaṭa'*] because, considering that the weapon used was not one of killing [*ālat qatl*], [the culprit] could not have intended to kill.[32]

The weapon therefore not only established deliberate intent but also determined all cases assimilated to mistake or "quasi-intent [*shibh al-'amd*]."[33] Understandably then the fiqh devoted lots of its energies to those "weapons," and even in the metallic category of weapons "above all suspicion," there were obvious pitfalls. For example, needles, like swords and knives, did fall in the category of very harmful weapons which use could lead to death; yet, needles, even though of a metallic nature, could hardly be linked "without any reasonable doubt" to an act of killing (actually, the same doubt should have been extended to knives and swords—a knife could be used, but with no intention to kill; jurists, however, did not look at such weapons suspiciously).

> It was noted in the *Bazzāziyyah* that if someone sticks a needle into someone's else [body] until he dies, [the offender] should be punished accordingly because the decisive element [*al-'ibra*] is the metal. But [the same collection of fatāwā] notes on another occasion that no punishment should be inflicted unless [the needle] was stuck on a mortal spot [*al-maqtal:* vital part]. And the same applies if [the victim] was bitten.
>
> I say: The limitation to the mortal part [*al-taqyīd bi-l-maqtal*] might have been the result of a convenient compromise [*tawfīq-an*].[34]

Be that as it may, a culprit should be punished whether his act was deliberate or not, even though the highest punishments were specifically intended for *'amd* acts. But it is not enough for a killer to ask forgiveness on

32. Ibn 'Ābidīn, *Radd,* 6:529.

33. Ibn 'Ābidīn, *Radd,* 6:530: "quasi-intent is similar to mistake, except when it comes to wrongdoing (*ithm:* sin, offense)."

34. Ibn 'Ābidīn, *Radd,* 6:528.

his own from God or from a religious authority; in fact, forgiveness had to be tied to punishment: "The repentance of a killer is invalid unless he gives himself up for punishment [*al-qawad-un*], and it is called *qawad* because the offender is led [*yaqūdūn al-jānī*] with a rope or something else."[35] Ibn ʿĀbidīn, however, fails to mention the exact nature of punishment (incarceration, public ceremony, etc.) and whether the punishment of serious offenders should be publicly performed, or whether the state and/or "local authorities" should assume responsibility for that matter; and if so, what were the exact purposes of incarceration and/or such public ceremonies. After all, there was so much violence delegated to the private parties, that any remotely possible monopoly of violence by the state and its various institutions would have seemed at best implausible.

Kinship settlements

The general trend was obviously in favor of settlements (*ṣulḥ*) among the disputants themselves. The "next of kin [*walī al-dam* or *walī al-jināya*]" would either forgive the culprit without requesting any *māl,* or else do so through a blood-money (*diya*) compensation. But the possibility was also open for the kin's own retaliation against the assailant. What complicated the matter further was that, unlike contract, symmetrical exchange was pointless; that is, there was no such a thing as "an eye for an eye and a tooth for a tooth": "There is a consensus among Muslims that the right eye cannot be revenged [*tu'khadh*] with the left one, nor the left with the right one."[36] In a way perhaps similar to the time lag between offer and acceptance (*ījāb wa-qabūl*), as if the process was one of gift and counter-gift, and where the ability and willingness to reciprocate cannot "equate" the challenge posed by the act of giving, there is no talion law strictly speaking: that is, punishment (*qawad*) cannot possibly be "identical" to offense.

This non-symmetry applies in particular to blood money (*diya*): "the *diya* in sharīʿa law is the name [associated] with the *māl* that compensates for the soul [*badal li-l-nafs*]. [However,] punishment is privileged [*quddima al-qiṣāṣ*] because it is in essence [*aṣl*] to the preservation of life and the souls. It is [therefore] stronger and the *diya* comes next."[37] The last statement should be read as: the *diya* comes only as a second alternative to the "kin

35. Ibn ʿĀbidīn, *Radd,* 6:529.
36. Ibn ʿĀbidīn, *Radd,* 6:551.
37. Ibn ʿĀbidīn, *Radd,* 6:573.

[*ahl*]"'s involvement in the process of retaliation. Rather than close the circle of punishment into abstract principles that would "measure" the degree and intensity of a fair punishment, sharī'a law leaves the actors with several possibilities. Thus, once punishment has been agreed upon, it remains to be seen which of the "kin" should enjoy that privileged right; then those legally chosen ought to decide between retaliating on their own or else opt for a settlement (either privately or in court); and, finally, in case they do so, how should the *diya* be assessed then (again, that could be either settled privately or in court)?

A fundamental aspect of sharī'a law therefore was the delegation of the legitimate use of violence to private parties,[38] which took two complementary forms: 1) either social groups enjoyed their own jurisdiction in particular when it came to criminal offenses; no arbitration was even needed from the official legal institutions, and this in itself would be enough to explain the very low number of crime cases in the sharī'a courts; or 2) a limited mediation would be forced upon social groups or individuals whose internal feuds might have required outside arbitration (from the sharī'a courts, among others); the courts would then leave the disputants with several aternatives, such as a settlement in the form of a *diya* whose amount would be determined in court. The very limited use of the sharī'a courts might have originated from individuals dissatisfied with what their kin had to propose, or simply because they had no "kin of value" to rely upon.[39] In both cases, however, the legal system would delegate its powers, either fully or partially, to local and kin authorities because it did not rationalize yet into a normative structure of abstract rules (the normative rules in sharī'a law were accepted as customary practices: that is, on the basis of their matter-of-factness, either as emanating from the Prophet and his companions or from sharī'a law).

38. In the contemporary Syrian penal system, the legal authorities claim, on the one hand, the legitimate use of violence for the great majority of crimes and homicides, but, on the other hand, it leaves to "kin members" the right to settle honor-crimes on their own and decide upon the punishment to be inflicted, which in many cases leads to the killing of the woman accused of dishonoring her family. This is then a case of a modern state institution (whose codes are a direct adaptation from French texts) that delegates to local "civil" forces (such as the family) the use of violence due to an impossibility from the legislative, political, and executive spheres to pose themselves as impartial arbitrators vis-à-vis civil society.

39. Niklas Luhmann, *A Sociological Theory of Law* (London-Boston: Routledge & Kegan Paul, 1985), 123: "To the extent that the clan is committed to self-help, there are further difficulties in creating and enforcing a clan-oriented law. "Jurisdiction" which is created for the regulation of the clan feuds stops at the threshold of the individual household. The murder of closer relatives therefore often goes unpunished. On the one hand, because the murderer controls his own immediate environment and nobody else could appear as the revengeful party; on the other hand, also because of the legal implications that the murderer has caused injury to himself at the same time."

A fundamental aspect of sharī'a courts was in restricting within a set of options the strategies of the actors, and, at the same time, delegating all retaliatory powers to those same actors. Thus, in the case of blood money, "the avenger of blood [*walī al-jināya*][40] has no right to refrain from receiving the *diya* without the murderer's consent [*riḍā al-qātil*], and that was one of two opinions from Shāfi'ī; in his other opinion [...] when punishment is a duty in *'amd* cases, it can only be transformed to [the status of] *māl* from the settling party [*jihat al-ṣulḥ*].[41] But no settlement would be based on more than the *diya* from the same species [*min jinsihā*][42] at the time[43] because otherwise [the exchange] will become a *ribā*."[44] Punishment therefore would only metamorphose into a *diya* with a deliberate intention for settlement—so that either the injured party receives the *diya*—and this is in itself a *sign* of settlement—since the murderer or his "kin"[45] transferred the requested *māl* to the victim's "kin"—or in case the victim's kin forego the *diya* altogether, then the murderer's approval is also needed: this request, strange as it might seem, follows the same logic as that of the *diya*'s transfer; in the latter, it is a sign of the murderer's approval for reconciliation, but when no *diya* is to be paid, the murderer shares the obligation to transmit his desire (or approval) for reconciliation verbally.

Blood-money payments

Who should pay the *diya?* Strange as it might seem, the murderer is in charge of the *diya* only under specific limited circumstances: "You should

40. *Walī al-jināya,* literally "the guardian of the crime," or the one(s) responsible for retaliation, seems to be synonymous with *walī al-dam.*

41. This last part—*jihat al-ṣulḥ,* the party seeking settlement, which in principle could only be the victim's kin—could mean several things. It could imply that only a settlement transforms a punishment into *māl;* or that such a transformation would only take place once the party that accepted the settlement—that is, the next of kin to the victim—decided to forgo punishment; in this case, however, Shāfi'ī's second proposition, unlike the first, places approval on the side of the victim's kin—unless the *jihat al-ṣulḥ* denotes the murderer, which is unlikely.

42. Since the *diya* was by definition a *māl,* any additional amount of the same kind as the latter would be considered as unlawful exchange.

43. Ḥanafīs were concerned that contracts involving money transfers would end up either under or over their originally conceived value. That could occur for a couple of reasons: either the intrinsic value of money has been modified, or else the currency in question has been dropped from circulation. In either case, the contracting parties should exchange based on the value of the currency "at the time" of the contract.

44. Ibn 'Ābidīn, *Radd,* 6:529.

45. More specifically, the *'āqila,* see below.

know that the *māl* [to be paid as compensation for a criminal act] of pure *'amd* should be from the *māl* of the killer[46] only when the soul has survived; and from his *'āqila* when the soul was only intended, even by mistake; and from his *'āqila* also in case of quasi-intent on the soul; but the *diya* should be paid by the killer in case of quasi-intent on anything other than the soul."[47] The options regarding the payment of blood-money and that should take into consideration the nature of the act (intentional or not), whether the soul (brain) or body were the target, and whether the victim survived or not, could all be summarized as follows:

Table 11-1
Homicide categories

act	soul/body	victim	diya (culprit/kin)
intentional	soul or body	survived	culprit pays the *diya*
intentional	soul or body	died	punishment; *diya* paid only if next-of-kin waver punishment
quasi-mistake	soul	survived or died	*'āqila*
quasi-intent	soul	survived or died	*'āqila*
quasi-mistake	body	survived or died	culprit
quasi-intent	body	survived or died	culprit

The culprit thus pays himself the *diya* under three circumstances: if his act was premeditated, but nevertheless his victim survived; or when under quasi-mistake and quasi-intent situations, the body rather than the soul was targeted. Needless to say, such attenuating situations are looked upon as "of lesser importance" vis-à-vis more "serious" ones such as when the "soul" is directly targeted or when the victim dies as a result of an intentional act. In the latter situations, blood-money should be compensated by the *'āqila.* Broadly speaking, the *'āqila* is the (professional) male blood relatives who are placed responsible for paying the legal fine to the next-of-kin of the victim. In Arabic, the *'āqila* stands as the feminine for *'āqil,* the sage, an adjective for an absent noun, that is, the *jamā'a 'āqila,* the wise group (of the culprit). A tradition claims that the brain (*'aql*) of the victim is wise (*'āqil*) when compensated with its *diya,* and the culprit's "group" is wise too, hence the term *'āqila* as something that qualifies the sagacity of that group for having realized that it ought to do something in order to compensate for one of their own's erratic behavior.[48] So who is that "group" associated with the culprit's *'āqila?* Defined

46. Perpetrator would be more correct since this case is restricted to bodily damage only.
47. Ibn 'Ābidīn, *Radd,* 6:530.
48. Muḥammad Rawwās Qala'hjī, *Mu'jam lughat al-fuqahā'* (Beirut: Dār al-Nafā'is, 1996), 271.

as the *ʿaṣaba* ("kin") of the culprit, or as his *ahl,* it also shares, as Schacht argued, several historical connotations.

> The *ʿāḳila* consists of those who, as members of the Muslim army, have their names inscribed in the list [*dīwān*] and receive pay, provided the culprit belongs to them; alternatively, of the male members of his tribe (if their numbers are not sufficient, the nearest related tribes are included); alternatively, of the fellow workers in his craft or his confederates; and the *ʿāḳila* of the client, both in the sense of a manumitted slave and of a convert to Islam, is his patron and the *ʿāḳila* of his patron. This institution has its roots in the pre-Islamic customary law of the Bedouins, where the culprit could be ransomed from retaliation by his tribe, and the inclusion of confederates and of clientship seems to be ancient Arabian too. The concept of *ʿāḳila* was Islamicized by introducing the *dīwān* which replaces tribal relationship, but the adaptation to urban conditions by introducing the fellow workers in a craft was insufficient, and the whole institution fell into disuse at an early date.[49]

The *ʿāqila* institution might well have fallen into disuse but the term was still in use in few nineteenth-century criminal cases—a possible indication that the meaning might have shifted over the centuries but still denoted *ahl* even in later periods. In short, what the *ʿāqila* pointed to was the broader professional, confessional, political, military, or familial belongings of the culprit. Thus, if the rule was that "in case of mistake, the *diya* must be paid by the *ʿāqila,*"[50] this was because the "mistake" had to be assumed by the "group" as a whole, but when it came to pure intent as such, the murderer was to be responsible on his own for the murder he committed since the death penalty might turn out an option.

Thus, crime was never reduced to an act between two individuals, the murderer and his victim; and was "extended" to the larger group: the culprit's *ʿāqila* and the victim's "kin [*qarāba*]." But if nineteenth-century manuals did not seem much enthusiastic in defining the *ʿāqila,* they did, however, devote a lot of attention to delimit the "beneficiaries" of a victim's "kin," that is, between "kin [*qarāba*]" as such and what was "foreign [*ajnabī*]" to it.

> What is meant by an outsider [*ajnabī:* foreigner] is someone who is a partner in the ownership of property but not associated with kin [*sharīk-an fī al-milk lā fī al-qarāba*]. So if a man was killed who had a senior paternal cousin from one aunt and another junior maternal cousin from another aunt, and both are foreigners, the right of retaliation [*qiṣāṣ:* punishment] befalls on the senior one because the reason for enforcing kinship is [retaliation] on behalf of the murdered person and [those two things, the victim and his kin] cannot

49. Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1964), 186.

50. Ibn ʿĀbidīn, *Radd,* 6:562.

> be dissociated from one another.[51] The same applies when the victim leaves behind a wife and a small child who is not hers,[52] the right of retaliation befalls on the wife because what is meant by kinship is the inclusion of marriage.
>
> The scholar Ibn ash-Shiblī[53] drafted a fatwā in his famous *Fatāwā* concerning a woman who was killed intentionally and left behind a husband and a small boy from someone else [that is, from her ex-husband]; and his reply was that the right of retaliation is for the husband until the boy reaches the age of maturity.
>
> When the killer gets killed justly or unjustly, his punishment is given up and [the victim's kin should forego their right to collect any] *māl;* and the same applies if [the killer] dies, he would have then concluded the punishment that was the obligation of a group [*al-wājib li-jamā'a*].[54]

Besides the distinction between the "kin" as such and its "foreign" elements, it is not clear what the rules were behind each category. Thus, the first definition of an "outsider"—or what comes close to a definition—is someone who has a "partnership in property [*sharīk-an fi-l-milk*]," rather than is kin related; and the example provided is that of two cousins, both children of aunts to the victim (a father's sister and a mother's sister); the two cousins are both outsiders in respect to the victim simply because of the way they "connect" to the latter: both are sons of women who are either considered from outside the father's kin—the mother's sister—or in the other case—the father's sister—the woman could have been married to someone outside the group. Let us then assume that a "foreigner" in this case is a descendant "related" to the victim either patrimonially or matrimonially, a "belonging" that might grant him inheritance privileges; but, since from his father's side there is no guarantee that he is from the same family as the victim, he is not allowed any retaliatory privileges. Furthermore, such privileges cannot be "shared" among several kin members and only a senior cousin is granted retaliatory rights. Thus, outsiders

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51. In Arabic: *li-anna sabab al-qarāba li-l-maqtūl wa huwa mimmā lā yatajazza. Yatajazza* is here the most ambiguous term: literally, *lā yatajazza* means indivisible, on the basis that a more correct spelling would be *yatajazzā';* unless the root is from *jazā* ("punishment"). But whatever the origin of *yatajazza,* the meaning is far from clear: What does it mean to say that the cause (*sabab*) of kinship is "for" the murdered person? Does this mean that the victim's kin are those who retaliate on his behalf and that such an act cannot be divided among several contenders for the task?

52. The only other alternative, since adoption is prohibited in Islam, is that the child had the victim as father, and the victim's ex-wife as mother.

53. ash-Shiblī (Abū 'Abdallah Muḥammad) (d. 769/1367): Damascene Ḥanafī jurist who was appointed as judge in Tripoli where he died. From his books, *Ādāb al-ḥammām,* and *Ākām al-mirjān fi aḥkām al-jān.*

54. Ibn 'Ābidīn, *Radd,* 6:540.

were granted, *faute de mieux,* such rights: that indirectly extended the narrow kin of agnatic relations to wider possibilities when no other alternative was possible. In other words, the "pure" blood relationships of kin have precedence over the other more "suspicious" kin, based on non-agnatic relations; but all this was a question of precedence rather than that of exclusion. Thus, in the second example, the small child ought to have had precedence over the wife since he was his father's own descendant, but "kin" favors marital life thus granting the wife a priority in action: in other words, kin does not provide priority in agnatic relations anymore since matrimony takes precedence. In the third example, the victimized woman left behind a husband and a small boy from an ex-husband. Following the previous example, it would be safe to say that the priority is for the husband since matrimony is privileged; but that privilege turns out to be temporary—until the boy achieves the age of maturity, which brings the third example closer to the first: the "next of kin" is a direct descendant, in this case, of the victim's own son. In short, the "next of kin" ought to be preferably a direct descendant, not necessarily agnatic, and in case no such beneficiary exists, the duty is transferred to someone else such as a cousin or spouse. But all such rules turn out to be uncertain since some jurists gave precedence, say, to matrimony over direct descent.

The system thus does not proceed in abstracting from the specific to the general but works entirely in terms of hierarchies and gradations. Hierarchies are created all along: metallic versus non-metallic weapons, the soul versus the parts, kin versus foreign elements, etc.; there are even further gradations within each category, while each gradation was subject, at times, to different juristic opinions. Avoiding abstractions, the system proceeds on a case-by-case basis hoping to leave no room for the unpredictable; but the method of mapping a territory while creating as many opinions as possible opens the door to *mujtahid*s to create additional opinions based on analogy and *takhrīj*.

Gradations also determined the essence of the system when it came to the intensity of the punishments and to those eligible to be punished. Such a logic stems from two broad principles: the soul and the body parts, on the one hand, and a general typology among different categories of individuals, on the other: gender, race, free persons versus slaves, etc. Such divisions, hierarchies, and gradations operated within the logic of customary practices rather than, say, from a purely juristic standpoint: in other words, they reflect a process of social and political divisions within society that would not be overcome either by a "civil rights" society or by a democratic and legal state. If genealogic affiliations mattered so much in crime, as it did in wills and successions, it was because "society" was genealogically construed. Juristic typologies were also genealogical tools that established affiliations within the fiqh (see Chapter 1 *supra*).

Thus, when it came to punishment, the system operated, in regard to the notion of kin, in terms of a general matter-of-factness: this implied, first, an ad hoc approval of many of the founders' views and those favored in the Ḥanafī juristic typology; then, second, accepting on an equally similar basis gender, race, and religion, etc., divisions that occupied the social fabric. It was thus reported (and hence approved) by late jurists that Abū Yūsuf stated that "there should absolutely be no punishment for the gouged out squint-eye,"[55] and the same founder also stated that "there should be no punishment when [only] part of the tongue was destroyed."[56] Even though the logic here might be that an already "damaged" organ would not be worth a punishment, or that when part of an organ was destroyed, and as long as it would keep up with its natural functions, it would not be worth a punishment either; this avoids, however, the problem of the offender's act and the fact that the intention might have been to cause bodily harm. But since the system seldom deals with offenders as such and delegates the responsibility of punishment to the next of kin, it might have been perceived that such offending actions are not worth the punishment in the first place.

When it came to gender, social inequality between men and women has its penal equivalent: "There is no punishment between a man and a woman when the soul was not [the target]."[57] But if the killing of a soul forces the law to equate between people, the damaging of specific parts does not:

> Zayʿalī said: To us, the edges [*aṭrāf*] follow the same path as the *amwāl* because like the *amwāl* they protect the souls [*wiqāya li-l-anfus*]. But there is no equivalency [*mumāthala*] between the male and female body parts [*aṭrāf:* edges] because of differences between them in value [*li-l-tafāwut bayna-humā fi-l-qīma*] based on the legislator's evaluation; nor between a free person and a slave, nor between two slaves because of a difference in value; and if they are equated in value [*tasāwa-yā fi-l-qīma*], it would be the outcome of conjecture and assumption [*al-ḥazar wa-l-ẓann*] rather than conviction [*yaqīn*]. [Equivalency] created uncertainty [*shubha*] so that punishment was avoided, in contradistinction to the parts of two free persons because, based on sharīʿa law, their equality [*istiwā'-ihimā*] is certain; and also in contradistinction to the souls because their related punishment has to do with killing the spirit, and there is no distinction [*tafāwut*] in this.[58]

Thus, the process for evaluating body parts divides them first between single and double, then assesses them in terms of use and functionality, but even

55. Ibn ʿĀbidīn, *Radd,* 6:551. The eye was described as the "machine of seeing (*ālat al-ru'ya*)."
56. Ibn ʿĀbidīn, *Radd,* 6:555.
57. Ibn ʿĀbidīn, *Radd,* 6:553.
58. Ibn ʿĀbidīn, *Radd,* 6:554.

functionality could be in one organ and affect another (smelling is linked to the nose but is finally processed in the brain: that's enough to double the *diya*). In short, a set of hierarchies works wonderfully for the free male body, and the above prescriptions, between men and women, and between free persons and slaves, add further to the already existing typologies. In sharī'a law therefore, crime and punishment do not obey general abstract rules: if anything, from the weapon used, up to punishment and bodily damage, the texts spend an enormous effort trying to create categories and sub-categories.

The perfect crime

Documents covering criminal cases are very rare and very short. In fact, in a milieu fully dominated by land cases and contractual settlements, crimes and torts look by contrast insignificant. Their rarity and shortness is partly explained in the shortcomings of sharī'a law regarding procedures, constrained in practice, as most cases below show, to privately crafted contractual settlements. Moreover, the lack of any penal code as such had pushed the Ottoman authorities, as early as the second half of the sixteenth century, to several regional qānūnnāme. Sharī'a law was also ambiguous regarding any public notion of crime: a damage inflicted upon a body was looked upon in a way similar to a usurpation over a property, thus rendering any idea of crime as a "public concern" rather limited, if not totally devoid of any meaning. That led to a system divided in two jurisdictions. Whenever collecting damages came to be the main issue that could be peacefully worked out between the parties, the sharī'a courts did set the standards. On the other hand, the regional councils, which were under the jurisdiction of the wālī, took hold of crime and tort cases for which no peaceful settlement was possible. The councils typically adjudicated based on the "secular" qānūnnāme rather than sharī'a law, and the rulings generally implied punishing the culprit rather than assessing damages and working out compensations. Those councils, which had boards composed of local urban notables, were primarily erected for legal purposes, and the choice of non-professional but well known notables was the only way to avoid the crucial issue of the legitimacy of the adjudicative process (see Chapter 9 *supra*). The fiqh manuals, however, remained silent both on that parallel process of adjudication supervised by the governor and regional authorities, on the one hand, and the compensation procedures held in the sharī'a courts, which were mostly nothing but fictitious litigations, on the other. Having therefore assumed the existence of that parallel adjudication, on the one hand, and the practice of pre-trial arrangements between parties in order to collect damages in the most convenient way, on the other, sharī'a

law did not evolve much throughout the Ottoman period and derived most of its categories from its traditional assortment of juristic opinions. At best, a muftī's fatwā was helpful in difficult cases, in particular those where the tool-of-killing proved of no help in solving le *mystère du crime.*

The legal system as a whole was very much motivated by a strong desire to limit, as much as possible, all elements that would throw a case into the unpredictable. With crime in particular, the most common question that faces a modern criminal inquiry is that of the (subjective) motives of a killer (even though in his groundbreaking *Common Law,* Justice Oliver Wendell Holmes mocked the illusion of the "subjective" altogether): motive establishes whether an act was premeditated, accidental, involuntary homicide, or else the outcome of unusual circumstances; it also questions whether the killer is, according to a popular medical terminology, "normal," "mentally retarded," "unstable" or "psychotic." All inquiry into motive and intent leads to a ruling that determines the intensity of punishment. Moreover, as an outcome of the industrial revolution and the heavy use of machinery in manufactures, tort law had to account for notions of "accident" and "mistake" that held someone "responsible" for a labor damage. In the same way that a crime in modern law is usually looked upon as a disturbance against "public order," an irresponsible behavior, say, in a labor environment is also a public misbehavior that the offender would be accountable for. The point here is that damage assessment is relative to what the offender has committed against the public order rather than simply satisfying a private party's desire for compensation. Thus when the Ottoman Majalla, reiterating notions from Ḥanafī practice, states that "damage cannot be compensated with another damage [*al-ḍarar lā-yuzāl bi-mithlihi*]," besides establishing the legal difficulties in assessing the "value" of damage and its "equivalent" (as *māl mutaqawwam*), the reasoning is still in terms of how private parties should be liable to compensation, in case they wish to do so. In short, Islamic penal systems, up to the Ottomans, did not think of damage afflicted to an individual as one harming the "public order." Hence the limitation of criminal court cases to contractual settlements that were for the most part the outcome of pre-trial arrangements. But even the regional councils, more concerned with punishment than the regular courts, looked at crimes and torts more as disruptions of the social order than as "errors" committed against any "public order."[59] In other words, crime and punishment remained for the most part symbolic—combining divine law, sultanic prestige, customary practices, and moral ordinances—rather than

59. The crime of *lèse-majesté* will be explicitly formulated only in the 1858 penal qānūnnāme, which, in turn, was based on the *Code pénal* (1810), and from which it reiterates the notion of crime or offense against the state and its institutions.

"disciplinary," that is, concerned with techniques that would have integrated individuals and groups into a civil society.

It is as if sharī'a law created a system of punishment and retribution that precisely avoids the (subjective) motivations of a perpetrator. (By contrast, western systems assume that ontological division between subject and object, individual and society, private and public, all of which have become standard in modern Middle Eastern codes—but do they have the same connotations as their western equivalents from which they are derived?) Such a step—a recognition that motives are fundamental—would have placed the system within a framework that would have been impossible to manage simply because its cognitive, political, and legal values favor an *objective* line of questioning that looks for external signs (signifiers) as elements of truth. Thus, the complexities of a criminal hearing had to be reduced to the instrumentality of the weapon as the most fundamental element of truth: that is, intent is objectively determined. In identifying motive with the weapon—a specific (metallic, for the most part) weapon implies premeditated killing—sharī'a law already took off the most essential and controversial aspect of a homicide hearing. Then, as a second step, once subjective motivation was out of the picture, the criteria for punishment was to be found into something marginal to motive: in the body organs themselves and the way they were classified according to use, functionality, or other genealogical criteria.

Pre-trial settlements

So what did a nineteenth-century criminal case contain? Not much. Either a plaintiff accused his defendant of a crime he had no evidence for—such cases came rapidly to an end and were as short as the acknowledgment of a contract—or else "some" evidence was provided but whose status was problematic: witnesses, for example, heard something but did not see it—the kind of evidence that only a muftī's fatwā would find a solution to; such cases, because of the fatwā's matter-of-factness, were also very brief. Other cases argued about *diya*s in terms of their amount, value, and conditions of delivery. That, however, was not enough to create long and complex cases because court procedures made the assessment of *diya*s even simpler than estimating the value of a defunct's properties and belongings.

By far, the most common criminal hearings belonged to the first category: plaintiffs without evidence, and defendants that denied all allegations either on oath or even, because no explicit request was made, without oath. Such strategies intended to vindicate a defendant's name from any wrongdoing by creating a fictitious litigation—sometimes years after the alleged crime—

through a formula that required the complacency of both parties; some cases, however, were a bit stronger in that they pushed for an acknowledgment of the plaintiff(s) right over their kin-victim's succession.

> **[C 11-1]** Yūsuf the son of ʿAlī and his wife ʿĀysha, the daughter of ʿAbdullah, from the village of Bakhʿūn in qaḍāʾ al-Ḍinniyyeh, were both present at the honorable sharʿī majlis that held its session in the province of Sidon. They claimed that Shaykh Milḥim b. Raʿd from the village of Sīr, in the same qaḍāʾ above, had, on Saturday 20 Dhul-Qaʿda 1266 [27 September 1850], premeditatively [*ʿamd-an*] killed their son Ḥasan by shooting him with a bullet and wounding him in his chest; he died from the repercussions of his wound. Since the parents of the deceased are his only inheritors, they requested that the defendant pays his compensation [that is, the *diya*]. When questioned about the complaint, the defendant denied that he murdered the plaintiffs' son Ḥasan and he requested from them to prove their allegations. They replied that they are unable to furnish the required evidence. They were then asked whether they wished the defendant to take oath three times in the name of God the Almighty. But since they did not solicit him to do so, the plaintiffs were forbidden to complain against the defendant without any substantial evidence.[60]

This type of case was by far the most common, even though the time lag between the alleged crime and the hearing itself—almost nine years—was indeed unusual, as it usually varies between several months up to a year or two at most. Considering the extreme rarity of crime cases in the nineteenth century, homicide hearings seem to have been even much more tightly controlled than those related to land or contractual settlements in general. Yet, the extreme brevity of the document forces us to question directly its points of silence and its ambiguities, and, above all, the long delay—nine years—between the date of the hearing and that of the alleged crime. This long delay, which repeats itself with slightly different time frameworks in other similar documents, could be looked upon as the *punctum* of the document-as-text.[61] First, inheritance in this case, unlike some cases below, was only part of the issue. The text in fact mentions that "the parents of the deceased are his only inheritors," a statement that came without any legal evidence, in the form, say, of a confirmation from a judge or muftī, probably because the plaintiffs' right of inheritance was more or less well established.[62] Still, even

60. Beirut sharīʿa courts, unnumbered register and pages, 6 ṣafar 1276 (4 September 1859). (Notice the nine-year difference between the alleged crime and the date of the complaint.)

61. On the notion of *punctum* in "reading" photographs as texts, see Roland Barthes, *La chambre claire. Note sur la photographie* (Paris: Éditions de l'Étoile, Gallimard, Le Seuil, 1980).

62. Inheritance would have been less obvious had the victim been married with children: in that case, his parents would have been among several possible inheritors, and their right for their son's succession,

though inheritance was neither the main nor the only issue, the text confirmed it indirectly: in declaring the accused's innocence, the judge also made the point, *en passant,* that the victim's parents were his sole inheritors. Could it be that such a confirmation was necessary to proceed with the inheritance? Or did the victim leave a succession that had problems? Be that as it may, the case does suggest that it was not only about inheritance, and, considering that in nine years the plaintiffs could not accumulate any evidence against their accused, their case was not about the *diya* either since they expected no compensation whatsoever. The other alternative, however, was that the passing of the inheritance to the parents was indeed a form of compensation, a quid pro quo between plaintiffs and defendant. Second, considering that the two plaintiffs decided to present their case in court nine years later, with no evidence in their hands, and without even requesting from the accused to take oath, suggests only one thing: that the purpose of this fictitious litigation was precisely not to accuse the defendant of any crime but rather to clear his name of any wrongdoing. In fact, what is known for certain is that the defendant was only nominally an "accused," and the lawsuit might well have been intended as a redemptive process. My assumption is that the plaintiffs received their son's inheritance in return—otherwise, why bother and mention it in the judge's ruling?

Since the apparatus of justice did delegate considerable powers to the parties in criminal litigations, it was left to the victim's kin to decide who was the murderer, then opt for the right punishment, and, if the *diya*-as-settlement was chosen, its "price" had to be worked out between the two parties. The "next of kin," who often posed themselves as the sole legitimate inheritors of the victims (even though the two categories of *walī al-damm* and *wārith* were legally very different, one involving property rights, while the former assumed blood relationships), could have requested—except for associating a murderer with the victim's body—at any moment, the mediation of the sharī'a courts. Thus, choosing or avoiding the courts was part of the strategies deployed by the social actors. In the above case, the "accused" might have had this title imposed by the other party for as long as nine years; he might also have been summoned to compensate in terms of blood money; but, for reasons impossible to guess, the final settlement came as a gesture in court to clear his name—an indication that disputants use the legitimacy of the court system and its prestige to push for an optimum settlement on their own terms and conditions. The other alternative—courts imposing their normative rules on the litigants—seems less likely due to the delegation of powers.

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including the *diya,* would have had to be established either by means of a legal order or through a strategy of negotiation with the other kin members and with the defendant himself (see cases below).

Even though all the Beirut cases below present on their own distinct variations from the first one above, they nevertheless all share common features: 1) the plaintiff(s) decided on their own who the accused was, and they were not helped in this task by any official institution; 2) the plaintiff(s) often introduced himself (themselves) as the (or one of the) inheritor(s) of the victim's succession; 3) it should therefore be determined whether the accused shared any responsibility in the crime; in case he[63] did, the blood money had to be divided among the plaintiff(s)-inheritor(s), that is, it was to become an integral part of the *tarika;* 4) because the plaintiff(s) litigated with no evidence, the common procedure was for the accused to take oath and deny (*al-yamīn 'ala man ankara*); however, many were not even summoned to take oath by the plaintiff(s)—since this was his/her/their own exclusive right to make such a request—and were thus cleared on the basis that no evidence was furnished and no one requested them to take oath; finally, 5) since it is highly improbable that the same weak point repeats itself from one case to another—namely, that plaintiffs accuse others of manslaughter with no evidence—the "litigation" therefore sounds from beginning to end purely fictitious—a procedure to settle on friendly terms rather than accuse anyone with wrongdoing. My assumptions regarding all homicide procedural fictions are therefore based on two main presuppositions: 1) that a crime did in fact occur—even though no independent investigation was ever pursued to confirm or disprove the alleged homicide; and 2) that the defendant must have been related to the alleged crime in one way or another. Again, those are only assumptions, but which make more sense than proposing that a crime did not occur in most cases, or that the accusations were purely fabricated; or, worse, naively assume that all those litigations were "genuine." Thus, within this perspective, not taking oath—with the plaintiffs' approval—was a device that prevented defendants from lying under oath, in case they did commit what they were accused of, as we have been assuming.

What such procedural fictions probably reveal are some of the most common rules of evidence among Ḥanafīs. Those are known as the "general rules" (*al-qawā'id al-kulliya*) that would be applied to both rituals and pecuniary transactions. Even though their existence probably goes back to the early stages of Ḥanafism, they nevertheless received their earliest mature formulation in Ibn Nujaym's *Ashbāh,* which was dormant for most of the Ottoman period, but then the importance of such rules and their practical side was rediscovered in the Majalla (1877) as the drafters of the first Ottoman civil code gave them

63. While the plaintiffs could have been either men and/or women, the defendants were always male. Thus, women were never accused of committing a crime.

a preliminary treatment by assigning the first one-hundred articles to those general rules.

The fourth rule of the Majalla, based on Ibn Nujaym's *Ashbāh,* states that "With doubt certitude does not fade (*al-yaqīn lā yazūl bi-l-shakk*)." From that general rule other sub-rules[64] follow such as the fifth rule: "The remaining of a thing in the state in which it was found is the presumption (*al-aṣl baqā' mā kān 'ala mā kān*)." In effect, both rules give priority to the "origin" (*aṣl*) of a "situation" (or "event"), so that as long as no counter-evidence has been offered to disprove that original state, it would then remain as it was (see Table 1-3 *supra*). Assume, for example, that a debtor claims to have refunded his creditor, while the latter denied so. Two possibilities then emerge: 1) either the borrower cannot furnish evidence, and hence the lender takes oath and the judge rules in his favor; or else 2) the debtor substantiates his claim and the judge rules in his favor. In either case, the original presumption holds true as long as no counter-evidence has been furnished, while the one who denies takes oath as evidence.

The homicide cases present us with a similar situation. 1) The plaintiff claims that the defendant killed the victim; 2) the defendant denies and requests the plaintiff to furnish evidence; 3) plaintiff is unable to do so; 4) the defendant could take oath as evidence of his denial, but the plaintiff does not push him to do so; finally, 5) the judge rules in favor of the defendant since the original situation—namely, the presumption of innocence for the defendant—is what remains valid. There are several other sub-rules that go side by side with the general rule on evidence, such as "When a thing is proved for one time, judgment will be given in favor of its continuance until there is proof to the contrary (*mā thabuta bi-zamān yuḥkam bi-baqā'ih mā lam yūjad dalīl 'ala khilāfeh*)" (Majalla, 10), or, "As to attributes which may exist or not, the presumption, which there is, is that they do not exist (*al-aṣl fi-l-umūr al-'āriḍa al-'adam*)" (Majalla, 9), both of which look upon allegations, such as a crime or a debt, as "contingent matters (*umūr 'āriḍa*)," which unless validated, do not exist.

To be sure, and from a modern perspective, such statements do seem strange. We know for certain that a crime did take place, and the evidence is obviously the body of the victim, so what does it mean to say that the crime did not occur? The reason for such a confusion is that we tend to think of a "crime" as an objective fact whose "causes" must be sought "independently" of the social

64. Regrettably the Majalla does not organize its material into rules and sub-rules, even though the organization of the "general rules" into "sets" would have greatly eased their comprehension as it would have become possible to put them together under different headings.

actors that might have been involved in its making. That's the dispassionate attitude towards all events in line with the epistemology of the enlightenment which works under the fiction of a knowing subject and an object to be known. In Ottoman societies, by contrast, a crime only exists *in the eyes of the public authorities* (and the courts were among them) only if a private party files suit in court. In such a case, evidence was not to be objectified into some kind of process where "truth" is to be sought dispassionately. It is rather to be found in any interplay between plaintiff and defendant, so that their confrontation through a hearing was what determined guilt or innocence. In short, *crime was transformed into a private tort* while guilt implied compensating the victim's kin.

> **[C 11-2]** Muḥammad b. Ibrāhim ʿAbbās from the locality [*qaḍāʾ*] of Tibnīn introduced himself to the sharʿī majlis meeting in the liwāʾ of Beirut, as representative of Maryam bt. ʿAlī al-Juzaynī, mother of the murdered Mūsa b. Jaʿfar, mentioned below, and of Khadīja bt. Ḥājj Muḥammad Zaydān, the wife of Mūsa. His right to represent them has been legally approved regarding the following lawsuit and what is related to it. The inheritance of the aforementioned Mūsa has been legally limited [*ithbāt inḥiṣār irth*] by the actual deputy of the city of Tyr, ʿAbdul-Muḥsin Efendi, based on a document he signed and sealed, to Mūsa's paternal uncle, his mother, and wife. The content of the document has been approved [by the court in favor of] the plaintiff-representative as part of a valid lawsuit against a denying opponent [*khaṣm jāḥid*] in order to represent [the plaintiffs] and [follow up] on the inheritance; all this was certified by [two witnesses][65] who know the two clients [plaintiffs] very well.
>
> [The representative] complained against Shiḥāda b. Aḥmad b. Ḥājj Sulaymān, from [*ʿashīrat*] ʿArab al-ʿUwaykāt, all of them subjects of the [Ottoman] state [*jamīʿuhum min tabiʿat al-dawla al-ʿulya*], and present with him in the majlis. [The plaintiff-representative] asserted in his lawsuit against [the accused] that on Friday afternoon, the third of Rabīʿ I [1284, 5 July 1867], over the bridge of al-Qāsima, Shiḥāda had hit Mūsa b. Jaʿfar b. Ibrāhīm, my brother's son [nephew], son of Maryam, and the husband of Khadīja, both of them being [my] aforementioned clients, with the sharp edge of a cutting knife on the left side of his waist, thus wounding him: his intestines became all visible. [The victim] was brought to Ṣūr [Tyr] and died there on Saturday morning as a result of his wounds. When [the accused] was asked to reply on [the representative's claims], he denied all allegations: the hitting, wounds, and death that resulted from the beating. The plaintiff was then summoned for evidence, but was unable to furnish any, and when he was asked whether he would like his opponent to take oath, he replied that he does not wish to do so.

65. Names and places of residence included.

> He was then legally forbidden to accuse [the defendant] of any [wrongdoing] because he was unable to provide any evidence.[66]

This case does not differ much from the preceding one (C 11-1) except that the two dates—that of the alleged crime and the court hearing—are much closer (a couple of months only; in the first case, the nine-year gap made the fictitious character of the litigation seem even more obvious). What this case, however, emphasized more thoroughly was the desire of the "next of kin"—the plaintiffs—to settle the status of the inheritance since, it was believed, that by settling first the issue of the accused and then the blood money that he ought to pay, the inheritance ought to come next. Thus, the plaintiffs's representative (who was himself a "next of kin"—the victim's nephew—and also a plaintiff alongside the other two) was given mandate not only to confront an "opponent denying his crime," but, more important, to take care of an inheritance whose beneficiaries had already been identified by a deputy judge (even though the identification of beneficiaries, through a previous court order, was not all too common). Since such a demand was explicitly stated in many crime cases, there is a serious possibility that with defendants strongly denying committing manslaughter, and with absolutely no evidence presented against them, such cases were designed to 1) clear up the accused's name; and then 2) proceed with the distribution of the inheritance among the beneficiaries. What strengthens this second alternative in particular are some of the document's more "marginal" sentences: the core of the text is supposed to be an accusation for manslaughter and, following some of the Ḥanafī opinions discussed above, only the wife was supposed to benefit from the right to retaliate (since the fiqh privileges matrimony); but the text soon managed to move from a restricted "next of kin" to one that was more general, that is, to all the beneficiaries from the victim's inheritance. The case could therefore well have been designed for that specific purpose: namely, to clear the way to proceed with the inheritance. The specific task of designating all beneficiaries was common to many crime cases. Moreover, some repetitive elements are already present in both cases (C 11-1 & 11-2): sharpness of the weapon, denial of the accused, who was not even asked to take oath, and, finally, plaintiffs with lots of claims but no evidence. Considering that plaintiffs were, in the final analysis, granted their victim's inheritance, such cases ought to make more sense when looked upon as contractual settlements rather than judges' rulings over homicides. The idea here was that what was accorded as a compensation for the brutalized *nafs* was a *māl mutaqawwam* sanctioned by the court.

66. Beirut sharī'a courts, unnumbered register, case 422, 28 Rabī' II 1284 (August 29, 1867).

[C 11-3] In the Beirut majlis and in presence of all its members, Yūsuf Efendi b. Aḥmad al-Qawnawī introduced himself as a representative of the woman Āmina bt. Ḥusayn al-Ṣaydāwī from Tripoli, the maternal aunt of Aḥmad, the murdered person [whose case will be discussed below], and the sister of his mother. The representative's right was certified by his own client in the majlis itself, and, beside representing her, he was requested to follow up the lawsuit, and to introduce her legally [*al-ta'rīf al-shar'ī 'an-hā*], and assert the fact that she is the aunt of [the murdered] Aḥmad, and his only inheritor as well; all this as part of a valid lawsuit.

The representative Yūsuf complained against the Greek Estillo b. Kirbāqū al-Yirāwī, present with him in the majlis, and claimed in his lawsuit that on Saturday night on 13 Ramaḍān 1283 [19 January 1867], in the café located in maḥallat Burj al-Kashshāf outside the city of Beirut, and in which was present Mitrī al-Sāqīslī,[67] the defendant Estillo did hit Aḥmad b. Khalīl al-Abyaḍ, from Tripoli, the son of Fāṭima, the client's sister, who was an officer [in the Ottoman army],[68] with an iron clad on his chest premeditatively [*'amd-an*]. He fell on the floor and was taken to the hospital in Beirut where he survived until the following day at eight [in the evening] and died affected [from his wounds]. And since the inheritance of [the deceased] is limited to his aunt, her representative would like to seek a legal [acknowledgment].[69] When the defendant was questioned on [the plaintiff's allegations] he denied hitting and killing [the victim] Aḥmad. The plaintiff Yūsuf was then asked to furnish evidence to prove his claims, but he failed to do so, even though he was given ample time. He was then presented with the option to request from Estillo to take oath, but he refused to ask him to do so. The plaintiff had thus his case dropped because of lack of evidence.[70]

67. Unclear why that name in particular was mentioned since the person was not involved in the case, not even as witness.

68. The full grade and rank was recorded in the document.

69. Who should have provided such an acknowledgment—the court or the accused? Strange as it may seem, the totality of the cases presented in this chapter do suggest that the acknowledgment was granted either implicitly or explicitly by the accused themselves. Whenever plaintiffs were short of official documents proving their right to inherit, that did not prevent them, however, to pose themselves as the sole inheritors and be acknowledged as such. But without the legal prerequisites, judges were unable to grant them such rights. Plaintiffs thus exchanged this recognition from their opponents—and that was the main purpose of those cases—on the condition that they would neither present evidence against them nor push them to oath taking. But since the accused enjoyed no legal powers to confirm a plaintiff's right of inheritance (except in rare cases when the two parties were closely blood related: the accused becomes also sort of witness), the acknowledgment was only implicitly established whenever the paperwork was absent, as in this case: claimed by the plaintiff, and left without proof, but never denied by anyone, hence de facto accepted.

70. Beirut sharī'a courts, unnumbered register, case 343, 18 Rabī' I 1284 (20 July 1867).

This case underscores the fact that the sole purpose might have indeed been the inheritance. In other words, the fictitious litigation *fixes* the identity of the inheritor within a specific set of procedures. First, the plaintiff posed herself as the victim's next of kin (in this case, it should have been the mother and/or father, but since the document did not specify that they predeceased their son, it is not clear why they were not the sole inheritors); only then, as a second step, did the plaintiff *also* introduce herself as the sole inheritor, so that the whole case looks as if the main concern was murder and that inheritance was a contingent effect. The plaintiff, however, would not have made such unsubstantiated claims had it not been for the quid pro quo involving her inheritance. But when the judge proceeded with his ruling, and since the plaintiff-inheritor had no evidence against her accused, the real purpose—besides clearing the defendant from manslaughter—became one of acknowledging the status of the plaintiff: "And since the inheritance of [the deceased] is limited to his aunt, her representative would like to request a legal [acknowledgment]." Even though such an acknowledgment was never and could not have been made explicit by the court, it was an *implicit* part of the contractual settlement: the court neither denied such a right to the plaintiff, nor did the judge ask her for any evidence regarding her alleged inheritance rights. Moreover, having refrained from providing the court with any evidence, either oral or written, regarding her right to inherit her deceased nephew, that right was legally assumed as genuine and part of an overall settlement. Yet, it was precisely because such evidence seems to have been problematic, that such fictitious litigations might have posed themselves as an alternative. In fact, fictitious homicide litigations were ideal, among others, for all inheritors with an "uncertain" or "weak" status—those that might not have been included among *aṣḥāb al-farā'iḍ*—and that this case (C 11-3) exemplifies well enough: the maternal aunt poses herself both as a next of kin and sole inheritor; not only the victim's parents were left unmentioned (and if they predeceased their son, why was this not mentioned?) but no evidence—on the right to inherit, and on the crime itself—was ever supplied. Only a two-step procedure compensates for such deliberate flaws: the plaintiff first introduces herself as a next of kin, as the "closest" to the victim with an eagerness to retaliate; she then posits herself as the sole beneficiary and muses with the idea of a possible peaceful settlement with blood-money compensation; and finally, she ends up, with the court's *implicit* approval, as the only legitimate heir. This case thus presents us with procedures similar to those already encountered in property litigations. For example, a waqf whose litigation was *in appearance* over who should be administrator (case of Bashīr III and his wife [C 6-1]), and whose ruling assumed an administrative conflict, turns out, upon closer inspection, to have been a fictitious litigation in order to confirm the status of the properties in

question as waqf. Thus, even though the ruling itself pondered solely on who should be administrator, it indirectly approved 1) the status of the properties, and 2) the distribution of revenues among beneficiaries. In other words, a final ruling that acts as a waqfiyya and which assumes several other implicit pre-rulings often constitute the *raison d'être* of the lawsuit. And since no waqfiyya was ever presented in the case of Bashīr III, the litigation-as-text poses itself as the de facto foundational act of the waqf, one that included all the bequeathed properties, conditions, list of beneficiaries, and the administrator's identity and role.

The same principle applies to some of the homicides in this chapter: their cases were brought to court neither to solve a murder mystery nor to acquit an accused with nothing in return for the victim's kin. What in fact the plaintiffs received in return for freeing their accused was an implicit recognition of their status as inheritors. At times, the explicit reference to the presumed inheritance took the form of a shameless bargaining—and this was even more so between family members where the transaction costs were minimal.

> **[C 11-4]** In the majlis of Beirut, responsible for the lawsuits in its liwā', and in the presence of all its members, was present Ḥājj Ḥusayn b. Ibrāhīm al-Shumaysānī from the village of Jubā', part of the qaḍā' of Sidon. He complained against his son, 'Alī al-Shumaysānī, also present in the majlis, and both of them subjects of the [Ottoman] state, and claiming in his lawsuit against the latter that on Tuesday night of the month of Dhul-Qa'da 1281 [March 1865], his daughter Kulthūm disappeared from the village. When her father [the plaintiff] and other inhabitants of the village began searching for her, they found [her body] two months later lying outside the village. Stones were thrown over [the body] with traces of beating and a wound. She was then buried. The plaintiff accused his son 'Alī, the defendant, of killing her on purpose with the edge of a sharp weapon; and since her father is her sole inheritor and there is no inheritor but him, it is requested that this be legally confirmed by his son, the defendant. Upon investigation, and after it was confirmed that Kulthūm's inheritance is restricted to her father, the plaintiff, the defendant was asked to reply to his father's allegations. He did so acknowledging that the inheritance of Kulthūm should be limited to her [and his] father, and denied ever killing or hitting her with a deadly weapon or something else. The plaintiff was then asked to furnish evidence in support of his lawsuit, but he replied that he had none, and was then told that he enjoys the legal right [to request] from his son to take oath [*fa-ta'arrafa bi-anna la-hu al-yamīn al-shar'ī 'ala ibni-hi*]. When he requested that [his son] takes oath, [the latter] swore that he neither killed nor hit her with a sharp weapon or something else. At that point, the plaintiff had his lawsuit dropped since no evidence exists [to support his claims].[71]

71. Beirut sharī'a courts, unnumbered register, case 548, 4 Jumāda I 1283 (14 September 1866).

This parricidal case, even though very similar in its form and structure to the previous ones (C 11-1, 11-2 & 11-3), nevertheless contains some unique features. First, the victim was a close family member, and what was unique here was the bloody incestuous triangle between father (plaintiff), son (accused), and daughter (victim). Second, the father wanted to be the sole beneficiary of his daughter's inheritance: thus, besides his desire to obtain an acknowledgment from his own son,[72] his other aim was to ensure that his son be denied any inheritance—and this, with the son's open consent. Of course, it is impossible to speculate over the motivations behind such a willingness; it does seem awkward, however, to accuse one's own son of a parricide the latter denied—on oath—in order to deprive him of a fraction of his sister's succession. What is even more striking is the accused's statement restricting his sister's inheritance to his father only. Considering that the accused enjoyed a full legal right to share with his father his sister's inheritance, his admission of his father's right as the sole inheritor—especially that he denied any wrongdoing—is the other strange "confession" in this document. We are then left with two possibilities: either assume that the son—for a reason unknown to us—was ready to sacrifice himself and his reputation for the sake of his father and lose his share in the inheritance; or assume—and this is more likely—that the case was an outcome of a bargaining between father and son: the son did commit the hideous crime (this would imply that he lied under oath), but the father accepted clearing his name in exchange for the totality of the inheritance. Some of the previous cases could also be read along the same line of thought: namely, that they were the outcome of settlements on the basis of "acknowledge that the inheritance is mine/ours and I/we dissociate your name from the blood of our victim."

In fact, and surprisingly, it was the inheritance rather than the *diya* that imposed itself in all four cases, but the plaintiffs, however, claimed the victims' inheritance differently. In the first case (C 11-1), "the parents of the deceased are his only inheritors," but with no formal proof whatsoever. In all likelihood, the plaintiffs, who had "lost" their case, opted for that kind of settlement precisely for the sake of the inheritance, and the only statement

72. What was the legal value of such an acknowledgment, and why did it have to come from the accused himself? Why not from a judge or muftī (C 11-2)? Such questions could only be answered in the context of all the Beirut cases in this chapter, all of which explicitly bring the inheritance issue, as if it was the only thing that mattered, thus suggesting that 1) a trade-in seems at work here between restricting the inheritance to the plaintiff(s) and the freeing of the accused; and 2) acknowledging the plaintiff(s)'s right to inherit was probably in need of a legal confirmation, and that was precisely what such fictitious litigations indirectly (as part of a broader ruling on the murder) brought to the plaintiff(s)—something that apparently was difficult, if not impossible, to obtain by other means.

regarding the latter, having been left unchallenged by both defendant and court, achieved ipso facto a legal status. The second case (C 11-2) was more specific since the beneficiaries had already been identified by a deputy judge. The settlement thus only helped to reconfirm the plaintiffs' right, on the one hand, and declare the case closed in order to proceed with the inheritance, on the other. In the third case (C 11-3) the inheritance also came up, and the plaintiff's representative requested "a legal acknowledgment," but neither the Greek defendant nor the judge came up with any explicit statement regarding the status of that inheritance. As in the first case (C 11-1), the plaintiff's request was probably only intended to be noted as such in the ruling, and consented as genuine simply because it was left unchallenged. Undeniably, the fourth case (C 11-4) was the strangest since the plaintiff's request was confirmed by the defendant. But what was common to all four was that the judges made no formal request for the plaintiffs to prove their inheritance rights. One would have expected, say, the usual corroborative witnesses. Such "lapses," however, were probably intended since the court's main concern was in principle at least solely focused on knowing whether the defendant was guilty or not. But while the text supposedly narrated the crime itself, it managed the inheritance as a side issue while in reality it was at the heart of all four hearings. That was indeed the whole purpose of those procedural fictions: redeem the crime as a private tort, and thus indirectly confirm the plaintiffs' right to inherit, or, as we shall see later, their right for the *diya*.

A closer look at the fourth text reveals several common features to both the fiqh literature and the three previous cases. The "sharp weapon" whose "edge" was allegedly used by the criminal constituted enough objective evidence, as required by canon law, establishing that the traces of stabbing, beating, and hitting were indeed intentional. As to the description of the damaged body, it barely touches upon superficialities, and is limited to a single statement: "Stones were thrown over with traces of beating and a wound." The father's right of inheritance was then formally requested, and as with the previous case (C 11-3), the plaintiff's right to inherit his deceased daughter was not pre-confirmed by a muftī or judge: that would have been impossible because the succession would have to be shared between at least both parents (in case the mother was alive) and brother (assuming that the victim had no other brother or sister). But that was precisely what the plaintiff did his best to deliberately avoid, probably as part of a pre-trial arrangement: bringing forth the strange conditions of his daughter's alleged disappearance and murder was an unavoidable step to insure his sole right to inherit her without sharing her succession with anyone else. That request was made for the first time after identifying the crime's metallic weapon; and was very soon followed by a statement that "upon investigation" the court confirmed the plaintiff's claim

for inheritance (on what basis, and based on which factual evidence?); no word, however, on how the court conducted its "investigation." An additional acknowledgment came from the accused himself—and that constituted the strangest part of the hearing, enough to draw a line between that case and all previous ones—probably more as a kin member who now acted as a "witness" than an accused. Indeed, the combination of son-witness-accused keeps pushing the text into new directions to the point that traditional borderlines had already been transcended by the time the ruling was announced: the quintessential moment was obviously when the accused turned into a witness and confirmed a statement uttered by the plaintiff. In other words, the space of the court did not create new roles for the parties involved, and left them with the strategies they were accustomed to in their social lives; the only thing that it was imposeed on them, however, was a *form of litigation,* essential for the court in order to proceed with adjudication.

Crime settlements metamorphosing into contracts

Peaceful settlements, however, were not always limited to a bargaining in the form of exchanging a redemption with an acknowledgment of an inheritance right; they were not limited to bargains between individuals either. As the following case shows, the defendants—consisting here of a group of elders in a village, hence, a class-action lawsuit—paid blood money to the plaintiffs even though they refused to acknowledge "their" crime in court.

> **[C 11-5]** To the shar'ī majlis responsible for the lawsuits in the liwā' of Beirut, and in the presence of its members, came Ḥājj Ḥusayn b. ʿAlī b. Ḥājj ʿIsa al-Kurānī from the village of Yāshir in muqāṭaʿat Tibnīn, [in his function] as guardian of the two minors, ʿAlī Mūsa and ʿIsa sons of Ḥusayn b. ʿAlī from the aforementioned village. The guardianship was approved in a signed and sealed document by the actual deputy [judge] of Tibnīn whose content is confirmed as part of a legal lawsuit against a denying opponent concerning [the status] of the two minors and their mature brother Aḥmad, an officer in the [Ottoman] army, who are all inheritors of their murdered brother Muḥammad: his inheritance being restricted to [all three], and has no legal inheritors but them.
>
> The guardian complained against Ḥājj Ḥasan b. Aḥmad b. ʿAlī from the village of Majdal Zūn in the aforementioned muqāṭaʿa, also present in the majlis, as legal representative of the rest of the elderly men in his village, [follows the names of a dozen elders], all of whom gave him the right to represent them [with the formal approval of] deputy [judge] Muṣṭafa Efendi in the following litigation [and for the following functions]: litigation, cashing, disbursement, settlement, disclaimer, acknowledgment, collecting, acquittal, and other kinds of contributions [*tabarruʿāt*]. This was based on a written document signed

> and sealed by [the above deputy judge] ... on 8 Jumāda I 1284 [7 September 1867] ...[73]
>
> [The plaintiff] claimed in his lawsuit against [the elders' representative] that the brother of the two minors and the mature one, Muḥammad b. Ḥusayn b. ʿAlī, was found dead in the property of Mārūn in the lands of the village of Majdal Zūn, in a location close to its built area, on Tuesday the fifth of March of the Gregorian calendar [1867] towards the evening. [The killing was performed] with a sharp weapon [damaging] his neck, head, and right hand, and two of his left-hand fingers. Regarding the location where he was found dead, anyone screaming there would have his voice heard in the village. The aforementioned people [of the village] killed him on purpose with a sharp weapon, so they are requested, based on the shar' [to confess their crime]. When [the representative of] the defendants was asked to reply [over his opponent's allegations], he did so acknowledging the existence of the dead body of Muḥammad b. Ḥusayn b. ʿAlī in the property of Mārūn in the lands of the village of al-Majdal, but that location is far from the built areas for about an hour, so had someone screamed, his voice would not have been heard; and no one from the people of the village killed him, or has any knowledge as to who did so. When the plaintiff was requested to furnish evidence that the voice of the murdered could be heard from the village, and that its people killed him, he said he was incapable of doing so. The two disputants then discussed the case on their own outside the courtroom, and the second day, they came back to court and consented that they reached a settlement based on denial [*ṣulḥ-an ʿan inkār*] and on two-thousand piasters to be paid by the defendants' representative to the party of the minors. Both parties have fully endorsed this settlement and signed it on behalf of the other, and allowed themselves to take oath on their own.[74]

Even though this case shares many similarities with all previous ones—a private party claims that a homicide took place against one of its "relatives [*ahl*]," and the party in question also—and simultaneously—claims the victim's inheritance *in toto;* a group of people were accused of murder by plaintiffs who were claiming their victim's inheritance and who never furnished evidence; and, finally, the accused *as a group* were found non-guilty because no concrete evidence was placed against them—that is not enough, however, to deprive the case of its uniqueness: 1) an entire group—vaguely introduced as the "elders" of the village—were accused of murder; 2) a cash "compensation" (was it a *diya?*) was handed in to the minors even though the defendants denied any wrongdoing and despite the fact that the plaintiffs were short on evidence. The case does indeed look like some kind of a class-action

73. The document was also certified by two witnesses.

74. Beirut sharīʿa courts, unnumbered register, case 475, end of Jumāda I 1284 (September 1867).

suit in reverse: a collectivity was accused of murder—which is unusual, considering that it does not take the entire population of a village to kill a single person—and their representative acted on their behalf. Beyond that, the accused-as-collectivity did not prompt for different court procedures and were looked upon as if one person. Could it be then that accusing a collectivity was symbolic: a single person committed the murder but a collectivity knew about it and approved the act, probably even helped? Be that as it may, the text did not distinguish between alleged murderer(s) and accomplice(s). If we understand by accomplice someone who did not commit the crime per se, but knew about it beforehand and possibly participated in its preparation and helped in its execution, what was then the notion of *sharīk* in the fiqh, and what kind of punishment was an accomplice subject to? The plaintiffs' representative, acting on behalf the three brothers (two of whom were minors), did not, however, frame his case within such distinctions, and their absence could well be that from a legal perspective the difference between murderer and accomplice, whenever a settlement was within reach, was not that relevant: the defendants as a rule were deemed not guilty.

The right of guardianship (and inheritance?)[75] was approved by a deputy judge prior to the hearings so that the case does not seem to have necessarily established anything new in this regard, but possibly only reconfirmed the inheritance rights of the two minors and older brother. The elders' representative was granted full power to negotiate and settle, with several functions clearly listed, and that provided him with the authority to propose a compensation despite the denial. So what is a denial *with* a compensation, or a "settlement based on denial"? Upon closer inspection, the case was not in that respect that different from previous ones: each settlement implied a give and take, a credit and a debt, a lender and a borrower, a contractual settlement—the succession (inheritance) or *diya* in lieu of the defendant's innocence, even if the latter maintained his denial, as all did; all such arrangements, to be sure, were an essential aspect of fictitious litigations—and this case was no exception. Since the inheritance was apparently guaranteed, the plaintiffs also pushed for a cash compensation, which they could not legally refer to as *diya* simply because the accused denied all charges. Regarding evidence, the plaintiffs, thanks to their representative, only suggested that their victim, having been killed with a sharp weapon, should have screamed, and he thus *must* have been heard in the

75. The phrasing leaves it unclear whether the approval by a deputy judge included both guardianship and inheritance, or whether only the former was legally approved while the exclusive right of inheritance, like some of the previous cases in this chapter, was one of the unproved claims put forward by the plaintiff.

neighboring village. Since presumably both things must have happened—the scream and its impact—the alleged murder must have also been a common enterprise; if not, then someone must have come to rescue, but that did not happen. Needless to say, such allegations did not contain much evidence, but that was besides the point: in fact, they were more meant to give a complete scenario of the alleged murder than to bring forth evidence, in the hope of strengthening the ethical over the legal. All "homicide stories" narrate, in a brevity only familiar to the sharī'a courts, what "we all know happened, but to which no evidence exists, so let us settle peacefully—honor versus *māl.*" Such a narrative "says it all" even if all is denied. Hence "a settlement based on denial," as the end of the text proposes, meaning that we said/know it all, all is denied, and we settle. Thus, "denial" here is more legal than actual: outside the space of the court, the parties knew what happened. Similarly, "signing on behalf of the other" and "taking oath on their own" were meant to imply that each party was fully aware of the other's motivations and intentions: I know why you have to deny; and, you know that I have to pay you the compensation you are implicitly requesting. It is in the nature of fictitious litigations to rely on such a double-language—one legal, the other social (religious, moral, and customary).

Since evidence-as-inquiry (or as "knowledge") had little place in the penal system, each statement and each correlative step—accusations, rebukes, testimonies, rulings—imposed themselves in their matter-of-factness. To begin with, the murder itself was an act of violence that the documents depicted as an incident caused by a "sharp weapon," also causing deadly wounds on the victimized body. As noted earlier, the "sharp weapon" was the objective signifier, powerful enough in establishing alone the premeditated nature of the act. The text thus never bothers to mention the intention of the killer: no motives, but only an accused, and besides a naming of the weapon (albeit in a general way—sharp—and without specifications), the text typically provided scant details of the damaged body parts: the purpose behind describing the *aṭrāf,* as they are referred to in the fiqh, was to assess the *diya*'s *māl,* in case the court hearing reached that kind of settlement, which it never did in all the cases dealt with thus far. The accusation, always from the plaintiff's side, and with no evidence to support it, was, like the murder it was supposed to "denote," also an act of violence that transcended itself through another act of violence: the accused's oath, if it ever materialized.

Because the judicial apparatus delegated the use of violence to the parties themselves, it failed to absorb the violence that disputants brought to court as part of their bargaining strategies. This would have required substituting the matter-of-factness of the actors' strategies with an abstract legal reasoning combining facts with motives, investigative procedures, codes that handled

court procedures, and normative values not restricted to custom. Indeed, the judge's "voice," already problematic in the less violent land litigations, is totally absent in this kind of criminal hearing: it is as if the judge's majlis that served as a medium for "arbitration" was deprived of the familiar tools of legal reasoning—it simply "recorded" what norms "imposed" on facts. In the last case (C 11-5), the accusation of an entire group made explicit what was contingent in other cases: namely, that for both parties, decision making was influenced by the group-as-kin. As to the ambiguity of "compensation," and in light of the preceding cases (in particular the one between father, son, and daughter [C 11-4]), it only makes sense to speculate that such "compensations" would not have been proposed in the first place had some of the defendants not participated in the crime. Hence, the quid pro quo between the two parties regarding not forcing the accused to take oath, since doing so might have implied lying under oath. Thus, the last case (C 11-5) established three de facto truths: 1) the plaintiffs were the sole inheritors; 2) the defendants were not guilty, but nevertheless accepted to compensate the plaintiffs; and 3) a cash compensation was added to the plaintiffs' inheritance. In other words, what all these cases were concerned with had nothing to do with solving the nature of the crime, its mystery, motives and intentions, or even finding out who the criminal was. The real concern was perhaps more related to Ibn ʿĀbidīn's prescription that "the parts enjoy the status of exchangeable things [*al-aṭrāf fi ḥukm al-amwāl*]." In fact, each case was concluded with a *contractual settlement* between the two parties: the body in exchange with inheritance, or rather the body was exchanged with *māl,* and in case some extra cash as compensation or *diya* was also granted; this was an additional *māl* to be added to that of the inheritance. In short, the legality of the judge's majlis enabled *māl* to achieve the status of *māl mutaqawwam,* that is, of an exchanged commodity that was legally protected and whose "value" would be refunded in case of a problem: the courts thus gave the disputants the opportunity to metamorphose their blood feuds into contractual settlements.

The murderous triangle and the cycle of debt

All five cases are structured in a triangular form—the cycle of debt: (1) the plaintiff and potential inheritor who initiates the suit, (2) the culprit-defendant who denies all charges, and (3) the victim whose wealth will eventually be transferred to the plaintiff.

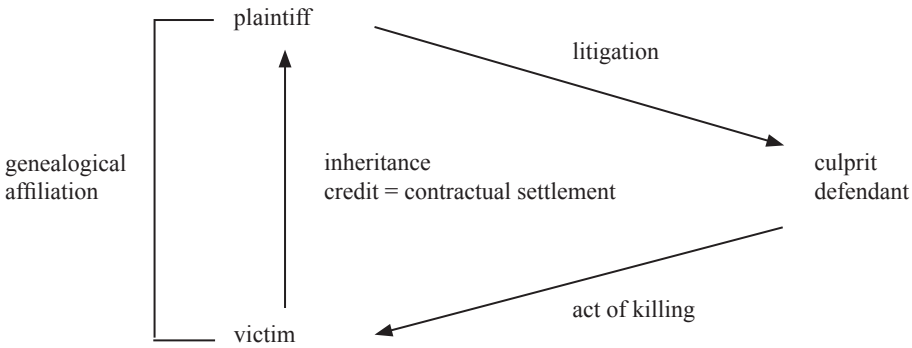

Figure 11-1. The murderous triangle.

The plaintiff is the one who initiates the lawsuit on the basis that he or she is agnatically related to the victim. On the other hand, the culprit-defendant enjoys no specific genealogical affiliation of consanguinity to either one (except, of course, in the parricidal case, C 11-3 *supra*). It was the defendant who allegedly triggered *ab initio* all action by depriving the victim of his or her soul. Each case is therefore haunted by the phantom of those victims whose wealth would eventually be transferred to the plaintiff. In effect, the *loss* of the victim would translate into a *debt* whose burden would be shared between plaintiff and defendant. The defendants were the ones who allegedly committed those crimes, and even though all of them strongly deny such allegations, their coming to court side-by-side with the plaintiffs, in what seems like pre-trial arrangements, only reinforces their "debt" towards the victims's families. In order to be freed from the accusation that hovers around his name, the defendant would *"give"* something to the victim's family, that is, his explicit recognition that the plaintiff is indeed the legitimate heir. Moreover, the plaintiff "owes" something to the victim whose blood has not yet been revenged, and he or she does so through a peaceful settlement with the defendant. It is, however, the victim who would eventually act as a creditor/lender to his or her next of kin, that is, the plaintiff who would be *permanently* indebted to the latter. As to the act of killing, which, whether perpetrated by the alleged culprit or not, has nevertheless triggered the whole process and placed all three parties in a relationship of debt. Thus, the alleged culprit, even though always in a situation of denial, would not have come to the courtroom were he not interested in clearing his name through a judge's ruling, and he would not have identified the plaintiff as the sole beneficiary had he not been implicated in the crime in one way or another (possibly as the real killer). The alleged culprit thus ends up as a de facto "real" killer who finds himself in a situation of debt not only towards the victim for having taken his or her life, but also towards the plaintiff as the next of kin to the latter.

Before closing this section, it should be noted that some crimes were simply reported: no plaintiff, no accused, and hence no settlement.

> **[C 11-6]** On Thursday at nine, 19 Rabīʿ II 1283 [August 31, 1866], following an order from the government [*al-ḥukūma*], an inspection [*kashf*] was performed that included Aḥmad Efendi al-Asīr, an official from the sharīʿa court, Khalīl Aghā al-Nimr, first lieutenant in Beirut's gendarmerie, and Aḥmad Efendi Iskandarānī, a surgeon. They checked upon the Egyptian Raḍwān b. Muḥammad al-Balṭajī, now in his father's home, located in Zuqāq al-Blāṭ outside Beirut. Upon inspection, he was found wounded in parts of his stomach caused by a sharp weapon. When his father was asked on the cause of the wound, he said that [his son] had a fight with ʿAlī b. Aḥmad al-Dālātī in the home of Ḥajja Warshāniyya, located in zārūb the small bath inside the city, and was hit with a weapon that wounded him. He died on Saturday, 21 Rabīʿ II, and his father requested a second inspection. The same team, with Anṭūn Efendi Naṣrallah, one of the members of the lawsuits majlis,[76] came back to his father's home and found Raḍwān dead, with no indication that he died from something other than his wound.[77]

A number of entries restricted themselves to that simple form. What was the purpose of inspecting without litigation and investigation? Since the above observations were recorded on the day of decease, and only two days after the team completed its first visit, there was no room for litigation yet (the other cases point to a minimal two-month period). Yet, a person was accused of committing a crime, in a way identical to all previous cases: that is, without any shred of evidence; but what differentiated the non-litigious cases from the others was that the accused did not show up as defendant, and hence was not even asked to accept or deny allegations (by taking oath). Since the victim's next of kin (the father in this case) made no request for a *diya,* or any other form of "compensation," one possibility for recording the murder was that of a follow up in the future (in the event, say, that a *diya* was to be requested). Yet, even though the father—as a potential plaintiff—had, compared to previous plaintiffs, all the "elements of crime" ready, he did not file for a lawsuit, which is perfectly logical since the previous cases mostly show not much of a judge's final ruling, but contractual settlements, and this has not been

76. The lawsuit majlis, *majlis al-daʿāwī,* could well be one of those regional councils created by the reforms. By that time, in the 1860s, the councils became much more professionalized than the early ones in the 1840s, at the time the reforms had just begun to be implemented, right after the Egyptian withdrawal from Greater Syria. In that case, the above entry, in a sharīʿa court sijill, could be an indication that a homicide had to be reported first to the regular courts, and the crime certified by a team of experts (a novelty all by itself), prior to its transfer to the more specialized councils.

77. Beirut sharīʿa courts, unnumbered register, case 503, 21 Rabīʿ II 1283 (September 2, 1866).

worked out yet here. Moreover, the period in question—the 1860s—was one of judicial reforms, and it could well be that registering a murder *as soon* as it occurred was not an option anymore (even though it was not to be expected that the victim's kin comply to such rules), rather than wait for months or even years until a settlement had been reached. The presence of a member from the "lawsuit majlis" upon the victim's death could be an indication that such cases were forwarded to one of the specialized regional councils created by the reforms policies of the 1840s and later (the 1860s were looked upon as the second period of reforms), rather than wait for a peaceful settlement mediated by the sharī'a courts. From such a perspective, the homicide was recorded first in a sharī'a court, only to be investigated later, following the newly drafted 1858 qānūnnāme, in one of the regional councils. But such a requirement, supposing it did exist, did not contribute in any way in raising the number of reported homicides to the sharī'a courts, which brings us back to the previous hypothesis that those "descriptive" cases should be looked upon in terms of contractual settlements they might engender in future bargains. A final note: recording a murder names a particular person as legally dead, and hence clears the way for his inheritance, and it could well be that such neutral records had no other purpose but to declare a person dead.

Hard cases

Obviously, not all crime cases were "soft," in the sense that either no "hard" decision making was required or else the outcome was predictable (settlement through denial). Some, especially rare ones collected from the Damascus sharī'a courts, might be described as "hard"—at least in the sense that the "elements of crime" took judges by surprise and forced them to request fatwās from muftīs.

> **[C 11-7]** In the court of deputy judge Muḥammad Ṭāhir Efendi whose signature appears above, the two brothers, Shaykh Zayn and Ḥusayn sons of Yāsīn al-Shay'āniyya, from the village of Bayt Suḥm, complained against the noble Amīn Āghā son of the deceased noble Darwīsh Āghā al-Shaḥrūr. They claimed that the defendant had beaten, eleven months ago, their mother, Ṣafiyya bt. Ibrāhīm Dūdāra, with a stick [*kirbāj*]. He hit her on her right side, arms, and legs. She had been sick for two months and thus died as a result of the beating. They demanded him to pay the legal damages and questioned him on that matter. When [the court did so, the defendant] responded by denying that he hit her on her side and legs, but only on her palms, five times with a stick. After hitting her on her palms, she lived in perfect health for two months without any signs of sickness that might have been caused by his beating. She thus died a natural death according to God's will and fate. The two plaintiffs were

> then asked to prove their case and to furnish evidence. [They] thus brought two witnesses, ʻAbbās b. Ibrāhīm, brother of the deceased, and Muṣtafa b. Muḥammad ʻUrmān, one of the inhabitants of the village. They both testified that the defendant had, eleven months ago, brought the now deceased mother of the plaintiffs ... to his *qaṣr*[78] inside the home of Muḥammad, the Shaykh of the aforementioned village. And when they were inside the *murabbaʻ*[79] of the *qaṣr,* we heard the defendant beating the now deceased mother of the plaintiffs. They did not see the defendant hit her with their own eyes but only heard him doing so. They have no knowledge as to whether the deceased died as a result of the beating or from another cause. At this point, the deputy judge, whose signature appears above, requested to prepare a draft of the lawsuit [*taḥrīr ṣūrat al-daʻwa*] in order to request a fatwā.
>
> A draft was prepared and sent to the greatest of all *ʻulamāʼ,* Ḥusayn Efendi Murādī, the actual muftī of Damascus, and after reading it to both parties and letting each one present his case, the reply came back on a sheet of paper [*qirṭās*] from the *amīn al-fatwā.* [The fatwā stated] that there should be evidence [in the form of] witnessing [of] her death because of [the defendant] beating her, and if there is no evidence of that, the defendant, having recognized the beating, should report to the judge what he finds convenient for himself [*bimā yalīqu bi-hi*]. The plaintiffs were thus asked, as the fatwā requested, to furnish a formal proof, but they acknowledged that they had no such evidence save [for the statements of] the two witnesses...
>
> At this point, the deputy judge informed the plaintiffs that having furnished no evidence, they do not have a [solid] case against the defendant. The case was then settled according to the terms put forward by the defendant, and the plaintiffs were forbidden to act against the defendant because they do not have a case against him. All this took place in the presence and knowledge of the most honorable *ʻālim,* Aḥmad Efendi Ḥusayn Zādah.[80]

The "novelty" here—compared to cases in which the victim either died immediately on the spot, or few hours or days later—was that the victim (the mother of the plaintiffs) lived for two months—"in perfect health," according to the defendant—prior to her untimely death. The other legal problem was that she was not hit with a "decisive weapon," according to both accounts,

78. Literally, a "palace," the *qaṣr,* in Aleppo, Damascus, and Cairo, was a "living room" located in the upper floor. In Damascus, the percentage of homes containing a *qaṣr* rose from around 6 percent in the middle of the eighteenth century to 19 percent at the beginning of the nineteenth; an evolution that could be explained by an increase of the more prestigious domains within the city, see Brigitte Marino, *Le faubourg du Mīdān à Damas à l'époque ottomane. Espace urbain, société et habitat (1742-1830)* (Damascus: Institut Français de Damas, 1997), 235.

79. Literally, a "squared place," denoted in Damascus a squared or slightly rectangular room, usually located in the lobby floor, see Marino, *Le faubourg,* 229.

80. Damascus 344/133/32-33/18 Ramaḍān 1252 (27 December 1836).

plaintiffs and defendant. Having established the general rule regarding the "objective" nature of the weapon used, our case here proves to be a "hard" one precisely because of the indecisive nature of the weapon, which all by itself proved enough to prompt a fatwā. Evidence had therefore to necessarily move in another direction, that is, other than the tool-of-killing. What the fatwā therefore tackled was the third indecisive element in the case: namely, that all evidence was heard, not seen. The plaintiffs thus lost their case on three grounds: the weapon, time of death, and evidence; and what the fatwā did was simply reject evidence bestowed on the basis of hearsay witnessing: unless the event had been directly witnessed, evidence should remain inconclusive. Not much room therefore for "circumstantial evidence," or a *reconstruction* of the crime. Having thus rejected a plausible reconstruction of the woman's death, the fatwā ruled in favor of the defendant.

But could the fatwā have done otherwise? Could it have, for example, *assumed,* simply as a hypothesis, that the beating did in effect cause the alleged "premature" death two months later? To be sure, that would have required an autopsy, which was unheard of at the time in that society. The autopsy would have *interpreted* any possible link, if any, between the beating and the state of the body. But in the absence of such a diagnosis, the fatwā becomes the interpretive tool par excellence. In effect, had our witnesses seen the event with their own eyes, as the fatwā had requested, would their testimony have been more conclusive? Let us assume that they had witnessed a "harsh" beating—but then how "harsh" is "harsh"? And by what means should this harshness be linked to a death that occurred two months later? The point here is that even direct (non-mediated) evidence would have required the action of a fatwā simply because the latter was endowed with enough symbolic authority to *interpret,* make assumptions, and create links between facts which would have otherwise been unauthorized.

Interestingly, a similar problem to that of the above case, questioning the value of evidence, was raised in Ibn ʻĀbidīn's *Radd:*

> A man complained against another for having beaten his mother on her stomach, and she died as a result of his beating. If the defendant says in the process of presenting counter-arguments [*al-daf'*] that she went out to the market after the beating, the counter-argument is invalid; but if he presents evidence that she improved after the beating, [this is considered as] a valid argument. And if one evidence was presented that [she was in] good health [*al-ṣiḥḥa*] and another that she died [as a result of the beating], the evidence of good health should be given priority. This was stated in [Kardarī's] *Bazzāziyya,* and *Mushtamal al-aḥkām,*[81] and Abū-l-Suʻūd [Ebu's-suʻud][82] recommended it in a fatwā.[83]

81. The closest title to this non-identified work is Qāsim b. Quṭlūbughā's *Mūjibāt al-Aḥkām.*

If going out for a walk in the marketplace was not enough evidence for good health, the other alternative for the defendant was to prove that she *was* in good health after the beating: in other words, good health cannot be proved by means of indirectly related external signs such as walking around or running; it must be proved all by itself through "direct" evidence. But how is this possible? (Further confusion is created by the use of "improved": What ought to be considered as an indication of "improvement" after a beating?) Should it be based on a medical report? Or on witnesses who were able to testify that they saw the victim in good health during a specific period of time? In all cases, criteria for establishing what good health is need to be specified, whether by medical experts or witnesses, but the fiqh manuals stop short in establishing such criteria. Furthermore, the opinion is stated without much explanatory arguments, but solely in conjunction with earlier opinions.

So the case, together with the muftī's fatwā and Ibn ʻĀbidīn's opinion, did not thoroughly elucidate what would have been looked upon as decisive evidence: some kind of evidence (such as the non-witnessing of an event first-hand) had to be eliminated. But, had the two witnesses *seen* the event, their seeing would not have necessarily allowed them to link the death with the beating; and the court, in turn, could have—because of the nature of the weapon—classified the death as non-intentional: that is, the purpose was to beat the woman and intimidate her, but not to let her die. A fatwā would in all probability have come at the rescue. In effect, even by modern standards, the relationship, if any, between the beating and the alleged untimely death two months later, would only be a matter of *interpretation,* primarily by the medical authorities. Had autopsy been available, the medical authorities would have had to *interpret* any possible effects of the beating on the woman's body. The point here is that since any damage inflicted on the body through beating reflects in an infinite number of ways, no abstract generalization could be made beforehand. In the fiction of the judiciary, however, only a muftī's fatwā, which enjoyed de facto oracular powers, could decide what the evidence implied under such circumstances.

> I say:[84] This is in conformity with what has been said when conferring on intent [*al-ʻamd*] which consists in the intention of beating [a person] with a weapon

82. Abū-l-Suʻūd [Ebu's-suʻūd] al-ʻImādī (1493-1574), Turkish faqīh and muftī known in particular for his fatāwā, also drafted a monumental *tafsīr* treatise, *Irshād al-ʻaql al-salīm ila mazāyā al-Qur'ān al-karīm*.

83. Ibn ʻĀbidīn, *Radd,* 6:541.

84. In the fiqh manuals, the "I say" stage comes after quoting a line of jurists on a specific issue and adjudicating among their opinions. In principle, it thus reflects more the outcome of an adjudicative process than a purely "personal" opinion. Questions (*masā'il*) left non-debated among jurists were looked upon in the "epistles [*rasā'il*]" genre that reflected the most personal style a jurist could get to.

> that destroys the [body] parts [*yuta'ammad ḍarbi-hi bi-ālat tufarriq al-ajzā'*]. So that if the intention was to beat him with a sword, based on what we said, [the offender] should be punished because the wound was caused by a tool of killing [*ālat al-qatl*] with the intention of beating. Moreover, regarding what we conferred on the perpetrator [*al-jānī*] at the beginning of the [*jināyāt*] book, that an intent [to beat or hurt someone] does not necessarily imply an intention to kill, the meaning of this is that the intention to beat someone with a sharp object [*muḥaddad*] does not all by itself [necessarily] imply an intention to kill. Thus, as long as the stipulation [*sharṭ*] is an intention to beat without killing [then the culprit should not be held guilty]. Even if a killing took place while using a sharp object, the act might not have been intended because it might have taken place accidentally. This is why I stipulate the [premeditated] intention of beating with [a sharp object for the purpose of killing before accusing the offender of premeditated homicide]. So, in this case, if the [perpetrator] had no intention of hitting [his victim] with the sword, the act is [legally looked upon] as non-intentional even if a killing took place with [a sharp metallic object such as a sword].[85]

This is one of those rare passages where the use of a metallic object that led to a killing does not constitute *per se* evidence of premeditation. But how would then a court establish premeditation with certainty? The culprit could have killed someone simply by using the "wrong" weapon: he could have for instance only meant to intimidate a person by hitting her on the neck but wrongly killed her because he used a knife instead of a stick; or he could have used a knife, killed the woman, but with no intention to do so in the first place. Thus, the two conditions proposed by Ibn ʿĀbidīn, taken jointly, look much more forceful than previous ones encountered earlier that gave more focus to the weapon *per se.* In fact, if the victim died because she was hit with a sword, it still needs to be known whether the use of the sword, and the act itself, was deliberate or accidental. But how could this be known? Such requirements might lead to the wrong impression that what sharīʿa penal law was looking for were subjective criteria that would determine the intentions of the killer-as-subject. Such a decisive step, however, would have required an important epistemological shift similar in many ways to that assumed by modern penal systems by scrutinizing the accused's "state of consciousness." But the fiqh shows no interest in associating acts with a phenomenology of consciousness; on the contrary, it would like to reduce all actions to objective criteria that would determine whether the killing was intentional. So the two requirements above should be read in light of passages quoted earlier that insisted upon the objective nature of, say, metallic weapons versus more malleable ones in determining intent. Whatever the requirements were, what it all amounted to

85. Ibn ʿĀbidīn, *Radd,* 6:543.

in practice was an association of intent with the weapon itself. Thus, all the Beirut cases create a direct association between a "sharply edged weapon [*ālat ḥādda*]" and premeditation (*'amd*), even though each one was concluded with a non-guilty verdict. But, as the Damascus case shows (C 11-7), when "the weapon was not meant to kill," the defendant was left unpunished. Even if the act of killing did not involve the use of a specific weapon, such as strangulation or drowning by hand, the objective criteria were transferred into something else. Thus, for example, in the case of drowning, the level of water was the most decisive criteria in determining intent: "What applies to strangulation is also valid in drowning: [the level of] water should be high [*'aẓīm*] so that [the victim] cannot escape; and is enough [evidence] to [Abū Yūsuf and Shaybānī] to assume [the drowning incident] as intentional and subject to punishment. But if [the level of water] is low, it usually does not kill, or it might be high but was [nevertheless] possible to survive because of [an ability] to swim [well]: thus, if [the person] was not tense [*ghayr mashdūd*] and he knew how to swim, as stated in the *Tātrākhāniyya* and other manuals, these are [examples] of quasi-intent [*shibh 'amd*]."[86] Knowing that someone could be pushed to be drowned in a high- or low-level water, what is the significance in insisting on drowning when "the water is high"? The text soon withdraws into skepticism: the level of water could be high, yet it is possible to survive in case one knows how to swim. What the text subtly attempts to marginalize, simply because it knows too well that it has no foreseeable solution, is that the level of water cannot be simply described as "high" or "low" due to an infinite number of variations in measurements, in the same way that a person could get drowned in an unlimited number of circumstances, or die for a number of reasons that modern law manuals usually bypass due to their conjectural character. All that is too well known, yet the text insists in limiting the infinite and unpredictable to a few hypothetical cases: the courts cannot possibly deal, under any circumstances, with all those possibilities—such a step would require placing the system under different epistemological foundations—so it limits factual evidence to a few hypothetically absurd and unconvincing conjunctures; and if defendants rarely did get punished, it was because of the encountered difficulties in reducing the factuality of the alleged crime to the few hypothetical conjunctures.

The murderer, his kin, and blood money

An issue that seldom imposes itself in crime cases, but to which the fiqh devotes a great deal of effort, was that of blood money: its amount, mode of

86. Ibn 'Ābidīn, *Radd,* 6:543.

payment, and by whom and to whom it should be paid. In fact, sharī'a law required payment of the *diya* by the *'āqila* of the culprit—the *'āqila* being broadly defined as the professional, military, confessional, tribal, or familial affiliation of the culprit—only in situations of quasi-intent (*shibh al-'amd*) and quasi-error (*khaṭa'*); but the culprit paid the *diya* all by himself when his act was looked upon as premeditated (*'amd*).[87] If the majority of crime settlements consisted of pre-trial arrangements in which the "innocence" of the culprit was traded in recognition for the next of kin's exclusive right to the victim's inheritance, by contrast, much fewer cases included a publicly discussed *diya*-as-settlement: in the other pre-trial cases, the *diya* came along only discreetly, and was part of a settlement that consisted in exchanging—on a contractual basis—the innocence of the culprit with the victim's inheritance; in other words, and to put things a bit more crudely, the victim's inheritance was *ipso facto* traded-in for his *diya.* This might seem strange considering that the next of kin was to become the sole beneficiary anyway; however, our Beirut cases point to the uncertain status of the next of kin. In fact, in both theory and practice, the beneficiaries of an inheritance and the next of kin were two different sets of legal beneficiaries which, at times, could have overlapped. To be sure, the beneficiaries of an inheritance, following rules established in the *farā'iḍ* manuals, were usually much more numerous than the next of kin. As the Beirut cases show, the plaintiffs were to impose themselves as the sole beneficiaries of the victim's inheritance in a two-step procedure: first, the next of kin introduced herself (or themselves) as plaintiffs *and* inheritors at the same time; second, a contractual settlement was reached whereby the defendant's innocence was traded-in with an implicit or explicit recognition that the plaintiff(s) was/were the sole inheritor(s). This also furnished a recognition (often in the form of direct adjudication) that the case was over: in the absence of a public authority that investigated crimes, only an acknowledgment from the plaintiff(s) that she/they were short of evidence would close the case *in order to proceed with the inheritance.*

Obviously, when no such pre-trial settlements were concluded, cases became longer and more confusing since the *diya* as a form of compensation had to be handled in all its complexity.

> **[C 11-8]** 'Alī b. Muṣṭafa Sharaf, the inheritor of his cousin's fortune, Ḥammūd b. Ḥusayn Hāshim Sharaf, together with the wife of the latter who was not present [in court], and his minor daughter, [all complained] against the Christian Ya'qūb son of Yūsuf. They claimed that the defendant had beaten, sixteen days ago, the deceased cousin of the plaintiff who died immediately as a result of a stone hitting him on the left side of his waist, which he was subjected to [by the

87. 'Awwā, *Uṣūl,* 243.

defendant]. He thus requested from him [the compensation] he legally owes him. When [the defendant] was requested to reply, he responded that he did have a fight with the deceased and that they held one another and both fell on the ground. The defendant had then beaten the victim with a stick [*qaḍīb*] on the shoulder,[88] but did not die as a result of the beating. He also denied hitting the deceased with a stone on his waist or that he died from the beating. He also claimed that [the victim] was sick for a year and died from his sickness rather than from [his own] beating. When the plaintiff was asked for evidence, he relied on two Muslim witnesses who both testified[89] that the defendant, [sixteen days ago], had a fight with the deceased, and that he did hit him[90] with a stone on his waist; the latter died immediately as a result of the beating.

[The plaintiff] then requested a fatwā regarding the legality of the two witnesses' testimonies. A reply came [from the muftī] suggesting that the witnesses' testimonies are accepted whether they were commended privately or publicly [*zukkiyat al-shuhūd sirr-an wa 'alan-an*]; but [the testimony] of the killer is not accepted in this context [*fī hadhihi al-ṣūra:* within this picture] because he neither used a weapon that was sharp enough [*muḥaddad*] nor that destroys the [body] parts [*mufarriq li-l-ajzā':* that fragments the body]. The judge then declared the mother of the minor girl as her guardian so that she could request on her behalf, prior to reaching the age of maturity, her share of the *diya* thus avoiding a long wait. In this kind of killing,[91] the *diya* is on the *'āqila,* supposing that the killer [belongs to] one; and in case he has no *'āqila,* then the *diya* is to be paid by the killer himself. The [value of the] *diya* is [as follows]: one-hundred camels, a thousand *mithqāl* of gold, and ten-thousand *dirham*s of silver, to be paid by the killer during a three-year period.

At this point, the assailant converted to Islām and [the plaintiff] requested [another] fatwā [regarding that conversion]. An honorable fatwā was thus issued whose content indicated that a non-Muslim [*dhimmi*] has hit a man with a stone on his waist, to the point that he died as a result of his wounds. Since this has [already] been confirmed by a judge, a *diya* was requested from the

88. "The defendant [then claimed to have] beaten the victim," would have been a more appropriate and accurate statement. But the courts, when it came to "quoting" or "paraphrasing" the disputants' utterances, were sloppy at best, thus making it difficult to differentiate between fact and allegation, first and third person, the opinion of the court and those of the disputants, witnesses, representatives, etc. But was it pure sloppiness? Actually, the language of the courts points to a discursive orientation in which the "individual" was marginalized in favor of the more "impersonal" authority of the courts, so that even the judge-as-narrator was impersonalized (or exteriorized) in the third person, thus giving a detached tone to the narration of each document.

89. As will become clearer later, the testimonies were apparently not delivered in court, and, because of this, the plaintiff had to push for a muftī's fatwā so that the testimonies be approved.

90. The text wrongly mentions the plaintiff (*al-mudda'ī*).

91. That is, one that was quasi-intentional or by mistake. The court, however, did not explicitly decide between the two since what mattered was that intentional killing was already ruled out.

> assailant [*ḍārib*], but he soon converted to Islām and he practiced the religion of Islām [*dakhala dīn al-Islām*]: should the *diya* then be maintained, rather than dropped [*tasquṭ*] because he converted to Islām? However, based on Ibn Nujaym's *al-Ashbāh wa-l-naẓā'ir,* his Islām invalidates [*yusqiṭ*] ...[92] the rights [*ḥuqūq*] of God but does not invalidate the rights of believers. Thus, based on this [opinion] and the fact that witnesses were commended in their place of living [*zukkiyat al-shuhūd fī maḥallāti-him*], the defendant was required to pay his *diya.* An order was issued in Damascus so that the defendant officially receives a legal notice regarding that matter. This was exposed to your excellency [*dawlatu-kum*][93] and the order is yours.[94]

Interestingly, the culprit was first referred to as defendant, then as killer in the first fatwā, and finally as assailant in the second fatwā: the change from defendant to killer immediately followed—or rather resulted—from the two testimonies. Unlike any of the cases discussed earlier, this one had witnesses who supported the plaintiff's claims; that was preceded by the defendant's own rebuke (*daf'*) of the plaintiff's allegations. Up to a point, the text takes a habitual path: arguments for the case, followed by counter-arguments, then testimonies corroborating the original arguments. Why did the court opt in favor of the two testimonies against the defendant's *daf'?* Was it that the latter had no witnesses? Two problems had to be worked out prior to adjudicating in favor of the plaintiff (the text seems to have relied on a previous adjudication, even though it goes unmentioned, while the ending suggests that the above text was only meant to give notice to the accused and notify the local authorities of a compensation that must be paid): 1) the validity of both testimonies, and 2) whether the accused's *daf'* could be accepted. The testimonies turned out to be problematic simply because they were apparently not delivered firsthand in court: in fact, the text's conclusion does suggest that they were recorded at the witnesses' *maḥallāt* ("place of living"). Moreover, a fatwā came at the rescue of both testimonies proposing their validity whether "commended privately [secretly] or publicly." Secretly here means in the privacy of the homes of the witnesses, while public refers to a court setting; but it remains unclear why the witnesses testified in the privacy of their own homes. Be that as it may, the testimonies were commended: Was that enough to render the accused a guilty person and impose the *diya* on his *'āqila?*

92. Unclear handwriting due to a damaged edge in the manuscript.

93. The beginning of the document explicitly states "exposed to your excellency [*al-ma'rūḍ li-sa'ādatukum*]," without, however, dropping any hint as to who this high-level personality was. The entry, which is right at the front page of the sijill, was probably added later and was one of those unusual cases which required that higher governmental officials, such as the wālī or defterdār, be notified.

94. Damascus 344/1/6/beginning of Muḥarram 1253 (April 1837).

The testimonies were not enough by themselves to reprove the defendant since the first fatwā had to decide on his own rebuke too. But other grounds contributed to making the defendant more of a killer: the "weapon" he confessed using—a stick—or a stone, according to his opponent—did not fall within the objective criteria for legally determining whether the act of killing was premeditated or not. As a matter of fact, he was even described as "without any weapon [*bi-ghayr silāḥ*]": both stick and stone (even though that was considered more damaging) lacked the legal criteria that would have endowed them with the required objectivity necessary in determining whether the act of killing was premeditated or quasi-intentional. In other words, the defendant's "weapon" was disregarded as "no weapon" simply because it met no objective criteria, compared, say, to metallic weapons with sharpened edges. Yet, the fatwā's statement is a bit strange, to say the least: "the killer's statements are not accepted in this context because he neither used a weapon that was sharp nor one that destroys the body parts." Having first approved the two testimonies as valid, the fatwā now qualifies the accused as killer. Ironically, had the alleged killer used a sharp metallic tool, the testimonies would have *ipso facto* become redundant because the weapon per se would have established proof of intent. So the accused would have been guilty both ways—with a sharpened weapon or without it: How would then such an accused prove his innocence? Note that in the previous Damascus case (C 11-7), a stick was also used, but since no two witnesses effectively *saw* the act of beating, the accused was found not guilty. The point here is that the accused—any accused—necessarily found himself in a deadly closed (hermeneutic) circle: either he used a sharp metallic weapon, with which he must have killed his alleged victim, and he therefore was proven guilty (meaning he will be either sentenced to death or pay the *diya* on his own); or else though his weapon was not decisive, two witnesses saw the alleged crime, he thus then might also be proven guilty. Was there any way for an accused not to be guilty? Only if he denied any wrongdoing, and his plaintiff was short of evidence, and oath-taking was completely bypassed. Such cases, even though very common, were mostly fictitious litigations involving contractual settlements. In other words, unless the alleged killer worked his own way with the victim's kin in some kind of pre-trial arrangement, chances were that he would be found guilty. Unless the victim died immediately, testimonies were only valid insofar as they bore a direct witnessing to the alleged crime, but only in combination with a decisive weapon would an accused be charged for a crime: only the weapon determined intent (to a certain extent), not the witnesses, and some jurists found it even redundant to ask witnesses whether an act was premeditated.

In our last Damascus case (C 11-8), the next of kin—one of the victim's cousins (the plaintiff), the victim's wife and minor daughter—explicitly

manifested their desire to receive the *diya:* since no trade-in was worked out for exchanging the defendant's innocence—he was found guilty—so the plaintiff's right of compensation, the *diya,* was requested, its value specified, together with a three-year mode of payment. To be sure, the *diya*'s value was high, indeed so high that the killer found it beneficial to convert to Islām. But what probably rendered any trade-in useless was the availability of witnesses, on the one hand, and the classification of the homicide as quasi-intentional and error-like, on the other. Those two factors combined tremendously limited pre-trial arrangements: the plaintiffs knew they had a strong case that anyhow would not be classified as intentional (hence the *diya* as a necessary settlement): So why settle for less?

In the second fatwā, the killer metamorphoses into an assailant (*ḍārib*)—a more neutral term that fell short of accusing the defendant of killing the person he assaulted. The reason might well be that it would have been embarrassing for the muftī to discuss the case of a "killer who converted to Islām," so an "assailant that converted to Islām" sounded much better. That fatwā brings the last two Damascus cases (C 11-7 & 11-8) close to one other even though in the former the accused was found not guilty: in fact, not only were both cases rescued by fatwās, but, more important, the fatwās came in lieu of the judges' rulings. In other words, they rescued judicial reasoning from a deadlock. In the first case, the judge was at a loss in determining whether a witnessed but only heard event should bear the same weight as one that was seen, while in the second, the defendant's conversion to Islām created difficulties in decision-making. However, fatwās, like the witnesses' oaths, imposed in their matter-of-factness a de facto ruling for the judge. In other words, the two judges did not even have to *reconstruct* in their rulings the logic of all the arguments introduced in each one of the two cases since the fatwās *were* indeed—or replaced—what ought to have been the judges' rulings. The logic of the legal apparatus as a whole did not permit a judge to proceed with his *own* normative values: the judge's consciousness should identify with the set of normative values constructed by the legal system.[95]

The two Damascus cases point to one common difficulty: whenever the case did not involve the use of a sharp metallic tool, it did *ipso facto* pose a legal problem that had to be transcended either by testimonies or fatwās—or both. Whenever the "weapon" could not establish the required objective criteria in

95. Niklas Luhmann, *A Sociological Theory of Law* (London-Boston: Routledge & Kegan Paul, 1985), 136: "a judge, who no longer has to simply mediate, placate, supervise the ritual and assist magical legal events, but has to decide, has to represent his decision as his own normative expectation. [...] It is no longer a case of maintaining disappointed expectations, but of maintaining decisions about disappointed expectations."

determining the accused's intent—was it intentional or quasi-intentional?—objectivity had to be guaranteed by other means, namely, by recapturing two of the most traditional persuasive tools of the sharī'a courts: witnessing and fatwās. The oath-taking of witnesses and muftīs's fatwās symbolically substituted for the violence of the crime since they both worked effectively only when taken for granted without much skepticism. They thus imposed a matter-of-factness within the legal reasoning—in a way similar to customary practices—that judges had no other choice but to accept.

The victim vanished

What happens when the alleged victim—someone whose relatives were convinced that he was killed—simply vanishes: there was no trace of a body, no weapon, but only the "last moments" of the allegedly victimized person were recounted by the defendants. Those narratives were the only left traces. Strange as it may seem, the courts followed the same procedures between persons who allegedly vanished and others who were killed. In short, there was an accused: either accused of "hiding" someone or of manslaughter, and unless evidence was furnished by the plaintiff—two witnesses—the defendant would be summoned to take oath (if the plaintiff wished him to do so) and found not guilty for lack of evidence. Once the plaintiff furnished evidence, the defendant was left with a *daf'*-strategy of counter-arguments, which had not been approved in the previous case (C 11-8) because of the tool-of-killing.

> **[C 11-9]** At [the court] of our honorable Sayyid Muḥammad As'ad Efendi, deputy judge of the noble [chief judge] whose signature appears above: Based on a report [*maḥḍar*] from the honorable *amīr al-umarā',* the greatest of all, and the defender of the provinces ..., Ḥājj 'Uthmān Bāshā Ketukhdā, and the honorable ... minister [*wazīr*] Ḥājj Ṣāliḥ Bāshā, the wālī of Damascus and the *amīr al-ḥajj* to the sacred House of God, let God preserve his doings, 'Ubayd Allāh b. Sayyid 'Abdul-Ghanī al-'Aṭash complained against 'Alī Ḥasan b. 'Alī from the village of Dūmā, that the son of the plaintiff, Ḥājj Ibrāhīm, was invited, twenty-eight days ago, at the home of the defendant in his home in the village of Dūmā. He left there a donkey, a saddlebag [*khurj*], and an aba [*'abāt*]; he has been missing ever since [*fuqida*] and his location is unknown. His father who has no knowledge of his life or death accuses the defendant and the people of the village for killing and executing him [*i'dām*] because he is missing and left at the defendant's home his donkey, saddlebag, and aba, and also because a request was made for the defendant to search for the missing person. [The court] then questioned the defendant and the Shaykh of the aforementioned village, Shaykh 'Abdul-Qādir Abū Amīn, on the truth of the matter. They responded that they had no knowledge of the whereabouts of

> that missing person, and where he is now, and that the defendant, the Shaykh of the village, and its inhabitants, have all been searching for him ever since he has been absent until this moment, but they have no news and found no trace of him. The defendant then recounted [the events that led to the disappearance] and claimed that [twenty-eight days ago] the plaintiff's son, Ḥājj Ibrāhīm, stayed as a guest in [his] home and that he went out towards sunset, but we have no idea where he went. At this point, the deputy judge whose signature appears above decided not to place a charge against the defendant either for killing [the plaintiff's son] or for sentencing him to death; he does not wish to accuse anyone else either. [The plaintiff's] lawsuit is therefore not valid [*ghayr masmūʻat:* not to be listened to] and [he] was forbidden from legally opposing [*muʻāraḍat*] the defendant.[96]

Why was the plaintiff never summoned for evidence? Once he narrated his own version of the story, thus accusing the defendant of deliberately killing his own son, the text moves to a questioning of the defendant. The defendant's reply—and those associated with him, the *ahālī* of his own village—was not restricted, as in previous cases, to a strong denial. He was given the opportunity to explain what happened and how he and the other villagers attempted to look for their host, but in vain. Clearly then, the whole case was an endeavor to clear the defendant and the villagers from both premeditated homicide or any wrongdoing. So why was the judge able to rule in their favor without the traditional oath-taking or at least without the usual plaintiff's acknowledgment that he lacks evidence? And why was the plaintiff not asked for evidence in the first place? In fact, had he been requested for evidence, and then replied that he did not have any, the defendant might not have been asked to take oath (this was up to the plaintiff to petition for such a request): the ruling would still have been in favor of the defense. Be that as it may, the unusual change in the structure of proof and persuasion in this case explains why it was necessary to fill the text from the beginning with the names of two very prestigious personalities—one of them was in fact the wālī of Damascus. Both had already completed, according to the text, a *procès-verbal,* in which they apparently reported the events, accusations, and denials. In other words, the prestige of those two noblemen replaced the regular judicial procedures: indeed, it was as if they reversed those procedures by acting as witnesses on behalf of the defendant's "party" (that is, the whole village), even though that was not explicitly stated as such. The reversal could also be explained in the following way: since providing evidence was always on the plaintiff's side (and this was usually actualized by means of two witnesses), defendants were normally denied *direct* evidence by means of witnessing and the like—they would only

96. Damascus 312/48/149/23 Rabīʻ I 1244 (October 3, 1828).

take oath and only when they were requested to do so. What happens then when an "accused" has enough evidence to counter the accusations? Defendants enjoy the right to rebuke (*daf'*) their plaintiffs' case by deploying counter-evidence (see the fatwās of the previous case [C 11-8]). But the accused in this case had a lawsuit normally filed against them in what might have been a fictitious litigation in order to reach a peaceful settlement. The accused only *indirectly* relied upon their two prestigious witnesses who "testified," so to speak, through a *procès-verbal:* the regular procedures were thus reversed and the defendants won their case. But the peculiarity of this situation should not hide what we have been saying all along: that proof and persuasion were not limited to a process of abstract legal reasoning that involved anything from fact-finding to applying the right procedures; they consisted rather of symbolically articulated violent acts (such as oath taking, witnessing, or the support of prestigious personalities) that "neutralized" the violence of the disputants and their kin. Such symbolic acts found their way within the legal system and became all by themselves procedural matters: testimonies, fatwās, oath-taking, and what might be called "status-witnessing"—individuals high in the social hierarchy that testify in court—by imposing themselves in their matter-of-factness thus replaced what might have been procedures based on the complexities of inter-subjective communication (most notably, in modern systems, direct- and cross-examinations).

The "public" jurisdiction of the regional councils over criminal procedures

Criminal procedures were therefore very much restricted to the limitations of sharī'a law and crystallized in the majority of cases either as contractual arrangements between plaintiffs and defendants (hence implying a "genuine" acknowledgment of the accused's non-guilt), or else to the modalities of a *diya'*s payment. But that leaves us with little corporal punishment, if at all. A question therefore begs itself: Was there any judicial procedures that led to specific punishments? Were there any other instances (political, legal, or other) that might have regulated punishment? And if so, why was the process divided into so many instances—between the sharī'a courts and other institutions? In spite of the scanty documentation available to us, it is still possible to discern how crimes—or mere felonies—were managed. To be sure, the sharī'a courts were restricted to a certain type of criminality and felonies, but, strange as it may sound, judges never took the decisive step in declaring a guilty verdict with punishment in mind, that is, incarceration. However, as the land cases already showed, several "legal" authorities competed among each other for the regulation and possession of landed properties. One of them was the Tanẓīmāt

majlis: composed of a dozen non-legal prestigious *a'yān* personalities, the council consecrated a division of labor between the legal activities of the sharī'a courts and the notables' political and economic administration of the affairs of the province of Damascus (see Chapter 9 *supra*). The land cases examined in earlier chapters point to such a division of labor among various jurisdictions: the sharī'a courts, on the one hand, took care of "privately" owned lands, hence their orientation was mostly towards inter-family conflicts (mainly as a re-distribution of properties along genealogical lines); while, on the other hand, the regional councils were mostly—if not strictly—limited to state-owned mīrī lands. Such a division reflected a retrenchment of sharī'a law into its own traditional domains and a close following of the Ḥanafī juristic typology, thus ignoring all kinds of new directives proposed either by leading jurists close to the imperial bureaucracy in Istanbul, such as Ebu's-su'ud (d. 1547). The sharī'a courts were therefore left without proper "legislation" regarding state-owned lands, and even though *timār* and *mīrī* adjudication was never officially withdrawn from their jurisdiction, serious *timār-mīrī* conflicts had to be transferred to non-"legal" authorities (the wālī's dīwān, and later the majālis of the Tanẓīmāt), even though the regional councils were indeed *legal* institutions. The creation of the councils was to primarily address the issue of sultanic legislation that would not have adequate support within the jurisdiction of the sharī'a courts. By the nineteenth century, what might still be referred to as "sultanic legislation" lost the organizational character of the sixteenth-century qānūnnāme, and various texts—imperial orders, edicts, firmans, decrees, etc.—were issued from the central authorities. Altogether, in addition to the older qānūnnāme, they formed that parallel system of sultanic legislation that the sharī'a courts could only partially handle. The wālīs' dīwāns, and later the regional councils, were there to precisely address that issue of parallel legislation. Thus, the reliance on non-legal expertise was only a *faute-de-mieux* step, one whose only other alternative would have been to create a corps of "secular" lawyers and judges whose functions would have complemented those of the sharī'a courts. Such a body of experts, however, would have lacked the legitimacy of the urban notables, hence the idea of council-boards with non-expert but prominent individuals.

The division of labor between the sharī'a courts and the majālis of the Tanẓīmāt thus also affected criminality: for some reason, which we need to explore, certain crimes had to be adjudicated by the majlis of Damascus. But, as usual, documentation is quite uneven and scanty, and even though the early Damascus Tanẓīmāt majlis in 1845 adjudicated on few crimes, their narrowness is enough to limit us to only few preliminary conclusions. Thus, for example, in a session devoted entirely to felonies and crimes (and that was unusual), the Damascus majlis looked upon individual cases of

alleged criminals who committed "wrongdoings [*qabāḥāt:* ugly things] thus prompting punishment due to the "ugly" side of their actions. Since they were incarcerated in the prison of Acre, they were to brought back to the majlis in order to investigate their crime and decide for each one the proper punishment corresponding to the crime in question. A memo was then to be addressed to the *ketukhda.*"[97] Take for example the case **[C 11-10]** of ʿAbdul-ʿĀl b. ʿAlī al-Hindāwī who was accused by ʿAbdul-Karīm b. ʿAlī Aghā Jabrī "of stealing his horse that he was able to prove against him in court,[98] that he robbed him in a wild land and took his horse. When witnesses testified [against him] he requested that he be refunded four-hundred piasters for his stolen horse."[99] The majlis then checked whether a "legal notification [*iʿlām sharʿī*]" had already been completed—meaning that documentary evidence did exist for what the plaintiff and accused said—and after receiving an affirmative reply from the *ketukhda,* the majlis ruled that the accused should be incarcerated for two years in the prison of ʿAkkā.

In another case **[C 11-11]**, the plaintiff Surūr Aghā accused Sālem al-Ṣālḥānī of the theft of three homes close to the courthouse and that he personally helped in moving them from the accused's home, and they were hidden, for safety reasons, in the chimney. Having acknowledged his theft, he was sentenced to a year of incarceration in the prison of ʿAkkā.

"It was decided," says the majlis report, "on behalf of Ḥasan al-Qurbī that he stole an alāja garment." In this case **[C 11-12]**, there was no plaintiff by name, but only an accused who was interrogated by the majlis on the alleged theft. He claimed that he bought a garment from Ibn al-Shaṭṭī and, in turn, sold it. Two days later, Ibn al-Shaṭṭī accused him of theft, which eventually led to his arrest. The majlis decided to release him from prison.

Several other theft cases were reported in the minutes of the majlis in addition to minor misdemeanors which, due to their similarity with previous ones, we need not get into here. One case **[C 11-13]**, however, involved a homicide. Muṣtafa al-Aṭrash was accused of killing his wife. Having first acknowledged the killing in the presence of legal authorities, he subsequently denied to the majlis having done so, only to later acknowledge for a second time. "Because of the woman's misbehavior [*ʿaybu-hā*] and because there is

97. Majlis Wilāyet Dimashq, 28 Dhul-Ḥijja 1260 (January 8, 1845), 89-90 (document 123). The *ketukhda* (or *katakhda?*) was a higher official, next to the governor and *defterdār* in the local Damascus bureaucracy.

98. The assumption here is that the hearings took place in a sharīʿa court, even though that was not explicitly stated as such.

99. All cases dealt with in this end-section are from document 123 of the Damascus majlis (January 8, 1845).

no plaintiff and no [blood] money payment in lieu of punishment [*ajr-an li-l-quṣāṣ*], a ruling requested that he be imprisoned for three years in ʻAkkā."

A final case **[C 11-14]** involved two culprits identified as ʻAbdul-Fattāḥ and Manṣūr who were both accused of having gunned down people from the village of Mazza in the vicinity of Damascus. According to their account, they came to the village asking for bread, but the inhabitants attacked them with sticks and ʻAbdul-Fattāḥ was severely beaten and hurt. Manṣūr, who had a gun, fired in self-protection and accidentally shot one of the villagers, a man described by Manṣūr himself as one "of good will, who came in person to the prison and dropped his case against me." The villagers, however, who were represented in the majlis by three of their inhabitants, had a different story. They claimed that the two alleged culprits came to the village at nine at night (no specific date) directly to the mill where a woman was sleeping. She had run away, came to the village, and told the inhabitants of the two strangers at the mill. But as soon as a group of the villagers reached the mill, they were shot at by Manṣūr, and one of them received a bullet in his thigh and was still under treatment. The majlis decided to keep the two culprits in prison until the wounded villager totally recovered, and concluded with an overall evaluation of all felonies and crimes it handled in that session: "Since the criminal activities of all the above prisoners have been legally scrutinized by the majlis, and each one was punished based on the crime he committed and its ugliness, the majlis saw it beneficial that they be disciplined, and it will do the same to all those who will behave badly [*ashqiyā*]."

The logic behind the division of labor between the majlis and the sharīʻa courts can now be reconsidered. To begin with, all cases, whether within the jurisdiction of the majlis or the courts, were "serious" felonies and crimes in that they either involved at least some form of bodily damage or theft, or at the most a homicide. Indeed, the seriousness of the crime (or misdemeanor) was not enough a criteria to determine under which jurisdiction a case ought to be handled. In fact, between the majlis and the courts, the division of labor was practically unrelated to the nature of the crime itself or its "seriousness": what mattered in the final analysis was whether a contractual settlement was possible or not. Thus, sharīʻa courts managed all criminal cases in which either a contractual settlement was possible or a *diya* had to be negotiated, while the jurisdiction of the majlis extended over cases in which settlements were not possible and a punishment in the form of incarceration had to be decided. On what basis, however, was such a division of labor performed, and why was punishment as such only within the jurisdiction of the majlis? Considering that nothing in sharīʻa law did prevent the courts from punishing culprits, why then did such a task become—at a period still to be determined—exclusively part of the majlis' legal authority? Finally, on what basis did the majlis adjudicate

over criminal cases and the like: meaning, which codes or legal sources did it rely upon, which procedures, and how were the duration of the incarceration periods assessed?

To begin with, the division in labor between the courts and majlis regarding felonies and crimes reflected a much broader division in Ottoman law between a "secular" qānūn and sharī'a law. More specifically, in the case of crimes and felonies, Ḥanafī practice neither operates within a concept of a penal law, nor does it clearly distinguish between an assault on a person and one on a property. In fact, Ḥanafīs did indeed look at the body in terms of an aggregate of parts, each one of which, in case of damage, would be assessed on its own for compensation. The body, in other words, was looked upon as private property that could be subjected to usurpation, and, in case of damage, compensation would be worked out between the two parties. With such a view, "investigative procedures" and fact-finding were limited: 1) because it all amounted to compensating the damaged party (either the victim him/herself or his/her kin), cases were thus reduced to private torts—similar in that respect to other non-criminal contractual settlements—rather than a public concern; and 2) since disputants—and plaintiffs in particular—provided the courts with their own "factual evidence," it all amounted to, in the final analysis, as to whether the other party would accept such claims or not—usually in the form of oath taking. Thus, indeed, the oath, like a muftī's fatwā, was oracular justice at its best, which brought law closer to common religious and local customs than to a proper legal reasoning of any kind. Reducing crimes and felonies to their compensatory aspects only, and the lack of a clear demarcation between what usurpation of a body and a land implied, are additional signs of the limitations of Ḥanafism when it came to the law's public role, especially state (public) law.

Since the sixteenth century, a leading muftī such as Ebu's-su'ud openly questioned "How are thieves to be 'carefully examined'?,"[100] a question which indeed goes to the heart of the limitations of sharī'a law. His reply came in the form of an anecdote about how the fourth shī'ī caliph 'Alī conducted an inquiry into an abduction, after the established procedures in court had failed to identify the culprit. Colin Imber rightly argues that the anecdote serves two purposes. "First, it justifies the removal of criminal cases from the *sharī'a* courts ... Second, it serves to justify non-canonical methods of criminal investigation and thief-taking, such as occur in the Ottoman Criminal code in cases, for example, of thefts from caravanserais."[101] What is important for our

100. Colin Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997), 223.

101. Imber, *Ebu's-su'ud,* 224.

purposes is that specific kinds of text, emanating from scholars associated by reputation to the imperial center, such as fatwās encouraging the promotion of non-canonical methods of investigation for crimes and felonies, were not at all incorporated in the Ḥanafī literature of the later periods. In fact, not only were they ignored, but in a way similar to the issues of rent and tax, which for the most part the Ḥanafīs kept discussing under the obsolete headings of *kharāj* and *'ushr,* that same literature maintained the canonical notions of crimes and homicides alive through procedural fictions. The sharī'a courts thus transformed crimes into contractual settlements. This has led to a clear division between the jurisdiction of the courts, on the one hand, and that of the regional councils and other state institutions on the other. Moreover, several legislative and adjudicative authorities with different discursive strategies, at times incompatible, competed with one another with no visible effort at bringing the judicial apparatus into a coherent whole.

The implications of such divisions and incongruent discourses on the *modus operandi* of Ottoman societies is obviously of fundamental importance. For one thing, it indicates divisions in the power-relations between regional and urban networks, on the one hand, and the imperial authorities on the other. The process of vertical integration between élite groups, from center to periphery, was always weak in Ottoman societies. To begin with, the imperial dynasty did not assume the role of a "court society" that other élite groups all across the empire could emulate. In other words, there was a "court" but no "court society" that would have integrated élite groups in terms of manners, literature, and art. In the Syrian provinces, not only the ruling notables were very different in their manners and kinship from those in Istanbul, but their internal differences were even more pronounced. Among the Maronites and Druze in Mount Lebanon, marriages in ruling families such as the Shihābs were either restricted to cousins from the same or related clans, or to "outsiders," meaning women that were not even from Mount Lebanon. In both cases, the aim was to avoid local marriages from nobility groups—a way for the Shihābs to consolidate their rule, politics, and properties; they also avoided pushing other ambitious families forward. In Damascus, notable families married among the closed circle of nobility and had no "court life" as such. And unlike the Lebanese nobility which had close contacts with its peasantry, not to mention the role of the Maronite Church in promoting a social ideology, the Damascus notables relied for the most part on rural groups of multazims to conduct their business and dominate the peasantry of the nearby fiscal units. But when it came to the contribution of the *'ulamā',* Damascus dominated in every respect. No other city in Greater Syria could match the output of the Damascus muftis and jurists since the sixteenth century. The point is that those jurists fought for their "judicial independence" from the imperial

bureaucracy and were able to maintain it precisely because of the weak process of vertical integration among élite groups in the empire. The system as a whole functioned more as one of subservience, balance, and bargaining between groups than with a desire to integrate. As a result, social groups made different claims and created competing discourses in the hope of maintaining their domination over institutions and networks. Thus, in both the judicial and political arenas, there was no visible desire to "integrate" populations, groups, and individuals (or subjects of the empire as they are often referred to) by providing them with a combination of public sphere and discourse, not to mention the various disciplinary techniques that go hand in hand with such integrative strategies.

The demarcation line between courts and councils becomes more visible once we realize that councils took over from the jurisdiction of the courts whenever sharī'a law failed on procedural matters. Thus, for example, both handled crime, but each limited itself to a specific procedure: the courts to contractual settlements and the majlis to an assessment of punishment. Similarly, the majlis dealt with land, tax, and rent litigations, but almost exclusively those related to mīrī or public waqfs; the reason being that sharī'a law felt uneasy about the massive ownership of state lands and was conceptually ill equipped when it came to taxation. So the sharī'a courts hardly dealt with taxes and were left for the most part with private litigations involving familial property transfers. For this reason, the Tanẓīmāt majālis, even though headed by a group of political personalities from prominent urban families, should not be seen as a political body, but primarily as legal institutions whose main purpose was to bypass the procedural limitations of sharī'a law. The fact that non legal political personalities adjudicated in such institutions only shows how difficult it was for the Ottoman authorities to create a body of "secular" lawyers and judges that would apply the qānūn.

The economics of crime

The types of wrongful conduct examined in various cases in previous chapters all consisted of illegally occupied properties, but even when the plaintiff's case turned legitimate, the defendant was merely summoned to vacate and restitute the disputed property (*raf' yad*). Thus, court action never ruled in terms of compensation, material or otherwise, that would have compensated the plaintiff either for direct damage to the property, or more importantly, for the losses he or she incurred during the defendant's illegal occupation. In short, if only the principle of restitution applies when a property is illegally occupied, then tort law, at least as far as property and contract are concerned,

is practically nonexistent.[102] Similarly, contracts were not protected by any tort law, and were subject to the rule of strict liability rather than fault liability. Thus, a seller was liable if his merchandise proved defective, or upon breach of contract, or if performance came late. But in all such cases, as restitution is the rule, the buyer would only expect to receive the commodity he paid for—and nothing for the damage he might have incurred. In fact, contracts follow the general rule of simultaneous (or virtually simultaneous) performance, and equal (or virtually equal) exchange, so that contract law does not protect any exchange outside those limits, hence the practical nonexistence of tort law. A contract law with much more leverage, one that would have given both parties a longer framework for execution, without limiting exchange to a strict principle of "equality," would have been impeded with the high information costs that such a law would require.

Not surprinsingly, private tort flourished in the domain of crimes, and homicides in particular. For one thing, crimes in Greater Syria—and unlike Egypt which became independent under Muḥammad ʿAlī and was decades ahead in self-imposed disciplinary measures[103]—were not prosecuted by the state, and were by and large left to the victim's kin for either direct retaliation against the defendant, or else for compensation from the defendant or his kin or professional milieu (*ʿāqila*). The fact that an alleged criminal had to pay a fine (*diya*) to the victim's kin or else suffer their retaliation creates a different economics of crime from the one we are accustomed to in modern societies.[104] First, the transfer of wealth from the criminal's "family" to the victim's kin must assume enough wealth-accumulation to sustain such an operation, and thus to allow the bypassing of direct retaliation into economic exchange. Second, such an exchange, and its limitation within the private kin domain, solves the problem of the high information costs that systematic investigative procedures (mostly by state institutions) would have required. Since a court action only

102. Even today, in countries like Syria and Lebanon, which by and large have adopted the French system of contracts and obligations, but with important variations, still do not have a sophisticated tort law. Thus, for example, a landlord who receives a late payment from his tenant, or a borrower late in his payment, are not compensated for the damages they might have incurred. Similarly, the whole category of "nuisance" is also rudimentary, and complaints against damage incurred from noise or pollution would go astray in such court systems.

103. Rudolph Peters, ""For his Correction and as a Deterrent Example for Others": Meḥmet ʿAlī's First Criminal Legislation (1829-1830)," *Islamic Law and Society* 6, no. 2 (1999): 164-92; Khalid Fahmy, "The Anatomy of Justice: Forensic medicine and criminal law in nineteenth-century Egypt," *Islamic Law and Society* 6, no. 2 (1999): 224-71; Jan Goldberg, "On the Origins of *Majālis al-Tujjār* in Mid-Nineteenth Century Egypt," *Islamic Law and Society* 6, no. 2 (1999): 193-223.

104. For a modern view on criminal law and its hidden economic benefits, see Richard A. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law & Business, 1998), Chapter 7.

began when one of the victim's kin sued—and usually it was for the sake of a peaceful settlement and exchange (monetary or otherwise)—investigation was informal and left to private parties, while the courts bypassed reliable evidence and the defendant's state-of-mind, and limited each homicide to objective criteria such as injury requirements and the tool-of-killing (*ālat al-qatl*).

When does a wrongful conduct become criminal? Modern systems distinguish between intentional torts and criminal behavior, so that in common law intentional torts "that represent a pure coercive transfer either of wealth or utility from victim to wrongdoer" are looked upon as criminal even though "the state-of-mind and injury requirements sometimes differ for the criminal counterpart of the intentional tort."[105] Considering that tort law is difficult to discern in "civil" Ḥanafī practice, is it meaningful then to draw any borderline between tort and crime? The question is difficult considering that, first, homicides were looked upon in the sharī'a courts as private torts that often involved wealth or utility transfer. Moreover, some homicides, for reasons that remain uncertain, were part of the jurisdiction of the regional councils, and so were thefts, which by and large fell outside the scope of the courts. The issue is complicated further by the fact that neither criminal intent nor recklessness, negligence, nor strict liability, come as an assessment in distinguishing between a crime and an intentional or unintentional tort. Thus, what determines criminal intent in Ḥanafī practice is nothing but the tool-of-killing, while strict liability rules over fault liability in homicides: the tool-of-killing thus achieves the prime status of a *corpus delecti,* a fortiori over the victim's body. The system also acknowledges the possibility of recklessness and negligence, only if they led to crime, and in that case a homicide was categorized as unintentional killing, *qatl khaṭa'*. However, as all the property cases we have discussed show, Ḥanafīs had no concern in discerning between tort and crime for either trespassing, unlawful possession, or conversion (which involves the use of force to remove a thing from the possession of its owner), nor was there any material compensation (or otherwise) to the plaintiff. In short, unlawful occupation, *ghaṣb,* required no more than the restitution of the property to the plaintiff without compensation. Strange as such practices might seem, they become more meaningful once we associate them with their economic components, primarily of which the high information costs, low wealth accumulation, and the importance of kin in such societies. In fact, since damages were neither awarded for loss of the expected profits of a breached transaction, nor for the expected revenues of an unlawfully occupied land,

105. Posner, *Economic Analysis,* 237.

and the standard remedy was restitution, the defendant's reputation would nevertheless be damaged from fellow kin members and his own locality. As secrecy and individual rights were rare commodities in such societies, knowledge of others was assured on an individual basis, and any misbehavior would prove detrimental for the individual and his or her family.

Since many of the contract and property cases we have examined in the previous chapters dealt with the taking of property, one difficulty was to distinguish between alleged takings whose purpose was to validate the plaintiff's ownership, and genuine takings in which the plaintiff was attempting a restitution of a lost property. The former are to be distinguished from the latter as procedural fictions whose only purpose was to extend the limitations of property law through contractual settlements; and procedures to make a waqf irrevocable fell into that category as well. The absence of an effective tort law considerably limits all distinctions between a genuine and a procedural taking. For one thing, when a court discerned an unlawful taking, it only summoned for restitution and fell short of imposing compensation for lost profits or damage. Thus, the borderline between a justified taking and a procedural one becomes very thin as both were not subject to tort law, but only to a law of property which brought the idea that a prolonged occupation could eventually lead to vested property rights. The lack of an effective tort law in civil suits, and the way possession easily mixed with ownership, has led to an array of cases where property rights were formulated as contractual rights, and in all such transactions, strict liability was the rule. Thus, the physical and legal cost of protecting private property, and the safety net that the group (or *ṭā'ifa*) provides to individuals in ensuring their well being and protection, in addition to high information costs when it comes to collecting evidence and the like, are among the factors that explain some of the major differences between modern legal differences and older ones.

Such factors also explain why, when it came to crime, only a limited tort law was applied. Thus killing, wounding, or paralyzing a body part were, in principle, all subject either to retaliation or compensation; while slandering, battering, and the like, were not open for compensation (but it was left to the injured party to decide on his or her own—that is, outside the courts—for retaliation), unless, of course, battering led to a bodily damage; and, finally, taking property was subject to restitution without compensation, while nuisance was hardly ever mentioned. Interestingly, then, compensation was an outcome of retaliation, meaning that compensation was in lieu of retaliation, whenever possible, of course. A property taking might also trigger retaliation (as many criminal court documents in contemporary Syria plainly show), but considering that takings were very common—including by the state—systematic retaliation and compensation would have ruined all available

resources. One could argue, as Richard Posner did, that for homicides (or the *jināyāt,* in their fiqh connotation), "The earliest remedy for tort—retaliation, often leading to a feud—yields in time to a system of compensation (bloodwealth, composition, wergelds) paid to the victim or his kin by the injurer or his kin."[106] Many of the homicidal cases in this chapter, from both Beirut and Damascus between the 1800s and the 1860s, point to a settlement through compensation, and, surprinsingly, besides the normative bloodwealth (*diya*), another form of compensation emerged: one that grants the plaintiff full rights over the victim's succession. Hence a crime was brought to the attention of the sharī'a courts only if the victim's kin sued, which was an attitude reminiscent of modern tort law rather than crime.

The nineteenth century was a period of reforms, and reforming criminal procedures was as crucial as land reforms; it was therefore no coincidence that both the penal qānūnnāme and the new Land Code were promulgated in 1858. Even though it is beyond the scope of this study to contemplate the outcome of the reforms, the transitional period could be revealing for our purposes, but, in the absence of empirical research, we can only highlight what future scholarship might contribute. From our standpoint, the major change could not be framed more clearly: crimes became *in toto* an affair of state, meaning that they had to be reported to and then investigated by local and imperial authorities, prior to a trial by one of the "secular" niẓāmī courts. Thus, besides imposing investigative procedures on each crime, private tort, and compensation became obsolete—at least officially.[107] But once the state decides to control crime on its own, there is then an implicit delegation of power from all citizens to the institutions of the state, so that a monetary compensation, if any, would take place through state law. Moreover, compensation is not the major issue anymore since crimes are objectified and a culprit must be found: thus the logic of what integrates society together drastically changes.

106. Richard A. Posner, *The Economics of Justice* (Cambridge & London: Harvard University Press, 1981, 1983), 192.

107. In American common law, compensation for a crime by the plaintiffs is sought under civil procedure, while criminal law only investigates the crime to determine the offender. This separation between investigation and compensation is not common to civil-code systems which typically tend to mix the two, as is the case in contemporary Syria where the same criminal court rules against the offender and compensates for the plaintiff. However, considering the meager compensations imposed by the criminal courts, plaintiffs tended to drop their cases early, before the verdict, and seek for compensation privately with the defendant's family, while the case kept running with the *niyāba 'āmma* as the prosecutor. Hence, the state has an obligation to follow even if the parties decide not to pursue.

The objectivism—or formalism—in decision making

The attitude that was adopted by jurists regarding crimes and homicides was one of "objectivism." To begin with, there was no concern with the "motives" of the act, but only with its outcome and with the way that outcome ought to be handled in court, but only if one of the victim's kin pursues the case peacefully rather than opt for direct retaliation. Thus, by focusing solely on the tool of the killing, the judiciary bypassed all kinds of subjective intentions, and moral and religious concerns as well, and opted instead for the outcome of the act itself; that is to say, if the victim was murdered in a particular way, say, by being stabbed with a knife, then that was enough "objective" evidence that the act was considered intentional. It should be noted, however, that such distinctions as "objective" and "subjective" neither occured in the *jināyāt* books of the fiqh manuals, nor in the other books and chapters related to crime and its compensation. Moreover, the meaning of such terms should not be confused with nineteenth-century debates in some of the western legal systems regarding the place that ought to be attributed to such things as "subjective intent," "motive" and "will," debates whose implications were not always similar between Anglo-Saxon common law and the Continent.[108] American lawyers were particularly concerned between the gross division within their system of "public" versus "private" law, and associating property, contract, and tort to the latter. With such a view, the "intention" or "will" of the contracting parties became essential in perceiving contract law as "private" in that it manifested the subjective desires of the individuals[109] rather than simply being imposed by the state as, for example, was penal law.

Ḥanafīs, however, even though they came close to such distinctions, did not frame them within the same perspective or for similar purposes. In contract law, the priority was given to the *alfāẓ* over the *ma'ānī* in that what was at stake, once the contract had been completed, was what the contracting parties

108. Morton J. Horwitz, *The Transformation of American Law, 1870-1960* (Oxford: Oxford University Press, 1992), Chapter 4. Oliver Wendell Holmes' *Common Law* probably expresses that shift more dramatically as he attempted an objectivist approach that jeopardized common assumptions in both civil and penal procedures.

109. Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989), has argued that representations of the individual in the western cultures as an autonomous "self" go back at least to Augustine, with Descartes' ego as its most modern incarnation: "The philosophy of disengagement and objectification has helped to create a picture of the human being, at its most extreme in certain forms of materialism, from which the last vestiges of subjectivity seem to have been expelled. It is a picture of the human being from a completely third-person perspective. The paradox is that this severe outlook is connected with, indeed, based on, according a central place to the first-person stance. Radical objectivity is only intelligible and accessible through radical subjectivity" (176-7).

formally promised one another, so that the judiciary wanted to avoid getting beneath the literal meaning of words and statements. However, and in the cases that required this, it was left to the discretionary powers of the judge not to limit himself to the literal meaning, which in practice implied accepting the customary vocabulary of a particular community. Ḥanafīs would not therefore totally overcome that distinction between literal and customary especially since, in the absence of a full implementation of the qānūn as a general norm in all the provinces of the empire, sharī'a law had to associate itself with custom to the point of rendering the distinction between the two irrelevant. The point here is that since the state did not impose its own law of contract, the division between state law and private law did not pose itself at this level,[110] and hence the division between what might be called an objective versus a subjective interpretation of social practices (a modern distinction that the fuqahā' did not perceive as such) had more to do with how much the judiciary would acknowledge customary practices. Jurists thus assimilated the latter as linguistic practices whose implications and meanings judges and muftīs had to decipher and become familiar with prior to any decision-making.

What we might therefore address as "objectivism"—or formalism in decision-making—expressed itself differently from penal to civil law. When courts were confronted with alleged homicides, judges would typically, if not solely, look for the tool of the killing (*ālat al-qatl*). To proceed otherwise would have implied a more elaborate and much costlier investigative apparatus of fact-finding, but not necessarily one that would have "subjectivized" the whole process. Similarly, judges opted for the *explicit* statements attached to a contract rather than, say, the intent of the parties or their performance once the contract was sealed. Courts had therefore to limit themselves on all kinds of oral or written statements rather than on the executory potentials of contracts.

What was a crime from the standpoint of Ḥanafī practice? The texts are categorical that the killing of a person is the most serious of all crimes, to which only blasphemy ranks higher, since it involves the voluntary taking of a soul (*nafs*) from life. But besides such a general claim, the texts neither come

110. Richard van Leeuwen, *Waqfs and Urban Structures: The Case of Ottoman Damascus* (Leiden: Brill, 1999), 153, wrongly describes the language of the sharī'a courts regarding waqfs as a discourse of the state. Besides the fact that such a discourse came directly from the Ḥanafī tradition and was therefore not specific to a particular political formation, the establishment of what Marshall Hodgson rightly described as the "military patronage states" in their Mongol, Mamlūk, and then Ottoman versions, only contributed towards promoting sharī'a law as a quasi-private law, one, which once mixed with local customs, protected the interests of the regional populations from an excessive militarization of urban life, taxation, and the forced exaction of rent by the state.

with a list of actions that would be labeled as "criminal" nor does it define "misdemeanors" or minor "felonies." The other problem, which has been a common concern throughout this study, is to see whether the practices of the courts have "added" anything to what the fiqh manuals have already stipulated. To begin with, a group of illegal activities, such as extramarital sex, wine drinking, and theft, have since early Islam consolidated as "crimes" subject to specific punishments (*ḥudūd*), so that in this domain Ḥanafīs did not have much to add. Moreover, considering that the courts were mostly conservative in the criminal cases that they handled, not only was there very little room for variation, to the extent that, besides homicide and theft, there were practically no cases of extramarital sex or wine drinking, such that the courts added nothing to the regular crime list. The importance of the courts, however, rather stems from the procedural fictions they created to absorb contractual settlements that were the outcome of alleged homicides. Thus, in a way that strangely parallels the contractual settlements and property transfers that we have encountered earlier in civil procedures, homicides metamorphosed as private torts where the plaintiff would request from the defendant either a compensation in the form of a regular *diya,* or else be guaranteed the victim's inheritance.

The phantom of the victim and the cycle of debt

We came across three distinct categories of crimes and felonies: 1) those involving peaceful contractual settlements, which were the subject of fictitious litigations in the sharī'a courts; 2) cases with genuine litigations, usually involving a muftī's fatwā, and whose closure could have been a settlement in the form of a *diya*-payment; and 3) cases that fell within the jurisdiction of the regional councils, which had to look for the right punishment, if not the death penalty. To be sure, such a tripartite division was not unique to crime litigations since it parallels those found in in contracts, land, rent, and tax litigations. However, the normative rules and procedures that derived from the latter might have been different from crimes. Even though Ḥanafism looked upon crime in a way similar to property, as an act of usurpation (*ghaṣb*) over a body, the consequences of which, be it a body or property, had different implications due to several levels of normative rules within the system. To begin with, the Ḥanafī assumption that "all body parts have the status of material (exchangeable) goods," leads to both the notion of *diya* and its assessment, on the one hand, and the impending procedural fictions on the other. In effect, by postulating that each body part could be assessed on its own and shares a different value from the rest depending on its location, function, and use, the body parts were indeed traded, upon damage, as valuable goods. The similarity,

however, between a tangible object and a body part was only limited to the fact that both would achieve the legal status of *māl mutaqawwam*. Beyond that, the exchange of a body part (*ṭaraf*) with *māl* was subject to a different set of rules than, say, a regular object. For one thing, a court had to decide whether the damaging act was voluntary or involuntary (or intentional or non-intentional), and whether the soul (*nafs*) was the main target or not, all of which dictate a set of legal procedures that were absent from the more contractual cases. Furthermore, the procedural fictions covering homicide cases, which were all construed based on charges of voluntary homicide (even though such claims were never proved), brought up another procedural matter: they constituted, in themselves, an act of exchange—the culprit's innocence for the plaintiff's right to inherit.

Mostly construed around fictitious litigations that favor contractual settlements which, in turn, shunned all kinds of investigative procedures, the sharī'a courts nevertheless had their own share of "hard" cases as well. A case was "hard"—thus, usually, as a rule, demanded a muftī's attention—whenever the alleged criminal weapon did not provide the decisive evidence that placed the court in front of a voluntary homicide—basically, all non-metallic weapons were indecisive (a metallic weapon might prove problematic too). To be sure, such cases were procedurally very different from the previous ones—those concluded on the basis of contractual settlements. In other words, the specific nature of a weapon—metallic or non-metallic?—on the one hand, and the desire of the victim's kin to proceed with a peaceful settlement, on the other, were what essentially dictated all procedures from fictitious contractual settlements to more genuine litigations in which a muftī's fatwā was usually the most decisive factor. Thus, all plaintiffs seeking a settlement that would guarantee their hold over their victim's inheritance claimed that the weapon used for the alleged murder was a sharply-edged metallic one. In fact, had the weapon turned out indecisive, the defendant would most probably have not accepted the bargain: he might have, had he accepted the accusation, argued for involuntary homicide, meaning that the death was caused by clumsiness and imprudence, or lack of attention. Homicide cases within the jurisdiction of the sharī'a courts were therefore purely contingent upon the weapon used, and that is what procedurally delineates them from all modern cases. In fact, in modern penal codes, which in the case of Turkey and other Middle Eastern states, are still based on the Napoleonic Code, the weapon itself never comes in as the most decisive piece of evidence, even though its decisiveness cannot be neglected either. Moreover, only by becoming civil parties to the proceedings would injured parties eventually hope to collect damages. By contrast, Ḥanafīs grant the victim's kin de facto rights either to retaliate or else collect damages in the form of a *diya*. But in the absence of even a minimalist investigative

apparatus (that would have undoubtedly required the use of "experts"), alleged culprits were only brought to court by the civil parties concerned, that is, by the victim's kin.

To be sure, the two head-two body legal system of the Ottoman empire was a reality in both penal and civil procedures, but the implications of such a division become meaningful only once a descriptive analysis has been completed for aspects that would encompass both the penal and civil. In penal matters, the general rule was that crimes fell within the jurisdiction of the sharī'a courts only when 1) pre-trial arrangements were completed and the parties were ready for a settlement, and, 2) when a peaceful settlement was not possible, thus prompting either a plaintiff to seek the *diya* in court, or an accused to request vindication for a crime he did not commit. On the other hand, whenever a crime did not fall within those two general categories, it was transferred to the regional councils. That invariably implied punishment, and the councils had to follow a different set of codes to assess punishment. Consider our final case **[C 11-15]** of a certain Ṭālib b. Sa'īd al-Qaṣṣāb who was accused by the Damascus majlis "to have been heated up at the sight of an army officer gazing at a woman in the street. Having first pushed and then took the officer aside in that empty street, a physical exchange took place when they held one another by the neck. There was thus a misbehavior [*quṣūr*] charge on both counts. The officer should not have gazed at the woman, while Ṭālib al-Qaṣṣāb should not have physically attacked the officer, but rather complained against him to the authorities. That constituted on his part an inadequacy and a crime [*quṣūr wa junḥa*], so that he should be punished based on the imperial [penal] qānūnnāme. In chapter three, article five, of the latter, it is noted that the punishment for this kind of crime should be an incarceration between fifteen days as a minimum and three months maximum. He should thus be imprisoned with his friend Ḥammūd for a three-month period at 'the house of the officer'[111] immediately. As to the officer, his punishment is within the jurisdiction of the military authorities."[112] Could such a case have been adjudicated by a sharī'a judge? Most likely not. For one thing, since the case was not structured on a plaintiff-defendant division, it seems to have been brought up by the local authorities within a "public misdemeanor" complaint. In other words, sharī'a courts were at their best within a privately orchestrated *khuṣūma* framework, while the regional councils' jurisdiction practically amounted to everything that the courts were unable to handle. Moreover, the sharī'a courts were weak when it came to minor misdemeanors, which

111. Sort of "police station."

112. Damascus Majlis, 12/15/23 Shawwāl 1260 (November 5, 1844).

typically the system assumed that they were left to customary punishment; besides, no sharī'a code ever regulated misdemeanors, hence the necessity of a qānūnnāme.

The shortcomings of sharī'a law and, in conjunction, those of the courts, pose some of the most essential questions regarding Ottoman societies and their legal systems. Even though Ḥanafī practice was, throughout the Ottoman period, subjected to the jurists' *ijtihād,* the changes were structured around a legalization of few customary practices. The system was saved in part, and its moment of death prolonged, by the qānūnnāme and sultanic legislation, which provided for a parallel legal system; then, second, thanks to all procedural fictions which "extended" the capabilities of the system without touching upon its basic premises. The question then arises as to why no attempt at creating a unified legal system ever came into being throughout the Ottoman period—except, of course, *in extremis* during the second half of the nineteenth century, with a set of Napoleonic codes. But were the infrastructures of Ottoman societies ripe for such a step?

Epilogue

Society as text: the infernal cycle of credit and debt

Our approach has opted for a micro-analysis of texts. By giving priority to text as such—any text for that matter, no matter what its institutional origins might have been—a descriptive analysis of social relations is achieved through the notion of society-as-text. Such a cinematographic and psychoanalytic approach deliberately selects from the massive amount of available texts the ones that will receive that privileged close scrutiny. A process of juxtaposition, montage, and collage of texts therefore follows, one that would give us a descriptive analysis of the social through its own languages and grammars. The notion of society-as-text therefore pushes us towards representations of the social through different angles, analytical tools, prisms, temporalities and styles, and lights and shadows.

The scope of this study has been to rethink social and economic relations within a textual anthropology, prior to rooting the socio-economic into a legal nexus of relations involving contractual settlements, property rights, and the transaction costs allocated to bargain for, negotiate, and secure (mostly status) contracts.[1] Anthropology proves crucial in describing pre-modern systems in terms of its kin groups, formal and informal networks of violence and vengeance, and the institutions that monopolize violence and act in lieu of a weakly implemented state power. The socio-economic history of the Ottoman Empire mostly assumes the existence of commodities in terms of their cost of production and market price, thus following the lead of neoclassical economics and European socio-economic history, both of which looked upon price (and its related indicators such as wages, inflation, and profit), population growth, unemployment, and production at large, as essential economic indicators. Shortcomings become more obvious, however, when attempting an explication

1. For a brief evaluation of the law and economics schools in the United States, see the "bibliographical essay" below.

of even some of the most visible "economic" choices. Why was the empire plagued by a common pool of state-owned property, one whose production cycles were inefficient at best? And what role did the parallel waqf system play within that massive land ownership by the state? Why did Ḥanafism operate within a dozen or so contractual formulas, and why were more settlements-cum-litigations patched through the practices of the courts to the already long lists of contracts?

For a long time Ottoman historiography has conceptualized the socio-economic history of the empire in terms of a dominating class of *a'yān-multazim*s, which by the seventeenth century had already replaced in its functions the old *sipahi-timar*iot class, and both of which (the old and the new) have been extracting a surplus-rent from the corvée labor of the peasantry. One could push the analysis further and claim a quasi-class struggle between the *a'yān-multazim*s and their peasantry, with the possibility of the state and its bureaucracy acting as a third intermediary power which enforced all the laws and the regulations (even though it did not have the full and exclusive monopoly of power), and with at least part of the bureaucracy also accessing the peasantry's surplus. But even though the existence of the *a'yān-multazim*s class, and its *modus operandi* with the peasantry, have been well documented on few occasions, an analysis that broad fails when it comes to articulating law with economics, describing the modalities of domination between those "classes" or groups, or explicating the complexities of the Ottoman legal system in terms of its well known broad division between the qānūn and the sharī'a, and the various (mostly) Ḥanafī contractual modes. But probably the biggest drawback of that classical model is its failure to account of the contractual settlements that routinely occurred within the dominating groups, and the dominated ones as well. Moreover, by placing domination that broadly—at the level of the *a'yān-multazim*s, which in turn is guaranteed by the state—a difficulty arises when we attempt to understand what it was exactly that held such groups together, and more importantly, why there was that incessant need to lock quasi-private property rights in the hands of the state, and grant them in the form of *iltizām* to loyal individuals and families.

While attempting to bypass the impasses of all class formulations, this study has followed a different approach at three levels. (1) A micro-analysis of texts, whatever their nature and origin, which pushes towards a narrative construction that looks for details within texts, so that the "bigger picture" is first perceived in terms of its smaller elements, which, at first sight, might be imperceptible. (2) Such a micro-narrative approach makes possible the construction of discursive formations on law and economics (and hence on society and politics too) from the point of view of the social agents themselves ("in their own words") rather than solely from the orderly material of the

historian. And (3) the combination of law and economics looks at property rights mainly in terms of the contractual settlements that made them possible, and hence asks for the transaction costs to enforce a particular settlement. Chapter 3 on contracts addresses that final issue and its relevance to judicial decision making.

Beginning with the general assumption that contracts function as a mechanism to transfer and secure property rights between social agents, and that the enforcement of property rights is a costly operation in which the benefits of acquiring property have to outweigh the costs, the contractual settlements common among Ḥanafīs, as well as those worked through the courts by means of procedural fictions, in addition to those imposed through sultanic ordinances and the like, have all been analyzed on the basis of the property rights they engendered. There are several benefits to such an operation, some of which were dealt with already, while others might need additional research. (1) The activities of the sharī'a courts and the regional councils are primarily perceived in terms of a general discourse that works out and favors particular contractual settlements, which in turn engender specific property rights. (2) Because of the necessary ties with contract, property rights do not have to be limited to the acquisition or possession of land only, but also in conjunction to incorporeal property (e.g., *dayn* and *manfa'a* in Ḥanafī practice) and intangible property (anything that enables one to obtain from others an income—i.e., property—in the process of buying and selling, borrowing and lending, hiring and hiring out, renting and leasing, in any of the transactions where *māl* is exchanged). (3) There are transaction costs associated with the acquisition and preservation of private property, and the social actors have to weigh all kinds of costs and benefits, which in the final analysis pushes them towards particular contractual settlements such as the ones we typically encounter in the sharī'a courts, or those that are enforced through the regional councils.

All three methodological assumptions combined provide a better explanation as to the well known division of the Ottoman legal system between qānūn and sharī'a, on the one hand, and the proliferation of specific contractual settlements that we find in Ḥanafī practice and to which the Ottoman period paid its dues, on the other; and finally, to explicate the existence of a common pool of publicly owned land known as *mīrī* in the Ottoman land-tenure system, whose "usefulness" or "efficiency" (or lack thereof) has always been assumed but never satisfactorily addressed in terms of its cost effectiveness relative to the other two predominant property forms, *milk* and *waqf*. In fact, a common pool of property like the mīrī points to difficulties in creating a competitive system of private property. Such difficulties could be anything from the securing of adequate water resources, to the legal and physical protection of the property (fencing and guarding from trespassing Bedouins and nomads,

etc.), and more important, the disadvantages of dividing properties owned in common—or commonly administered—by clans, villages, and peasants, and allotting them to individuals. The assumption here is that all such operations would have turned unprofitable had the system as a whole opted for privately owned properties. But, on the other hand, a common-pool system like the mīrī generated enormous losses too due to its uncompetitive nature and the overexploitation of the land resources. Moreover, and considering the political nature of the iltizām-mīrī system (in the way it allocated tax-farming units to inefficient and corrupted multazims), the system as a whole must have generated a great deal of loss, whose burden must have been assumed by the community as a whole in terms of lower production rates, higher taxation, and lower rents (more about this later). The assumption here is, of course, that the other alternatives, namely, a fair collection of taxes by state officials based on income and production, and a competitive system of landownership where land is freely exchanged as a commodity, would have been costly to implement as such, so that their implementation costs would have been far greater than their benefits. It is as if Ottoman societies had opted for the most affordable solution, one that favors communal ownership, the division of resources among clan members, a massive state ownership of lands and their distribution for purposes of usufruct to specifically appointed individuals and families (even though the iltizām system assumes an auction to the highest bidder), and one that avoids difficulties in keeping private properties safe and secure.

A similar perspective could also help in understanding the need for multiple contracts. In fact, rather than opt for "free" contractual settlements—so that the contracting parties would decide on their own, and prior to any legal arbitration, the modalities of their transaction—Ḥanafism classifies transactions in terms of different contractual settlements whose enforcement varies greatly from one formula to another. Additional contractual settlements were created through court practice as the needs grew, not to mention contractual regulations and the like imposed by sultanic ordinances and the regional councils. An open contractual form would have implied higher transaction costs, which at their most basic level would have included the costs of negotiating, monitoring, and enforcing contractual agreements, all of which assume, in turn, high information costs (the information that is needed to assess the other party's liability history, the various forces on the market, and the likelihood of detriment, etc.). Such risks, however, were minimized through a legal system that allowed only specific kinds of clearly categorized and labeled transactions. In fact, even a casual look at some of the Ḥanafī contractual forms undeniably points to the desire to minimize risk at all levels, either by considerably reducing the duration of the transaction (which in many instances was assumed to be nearly simultaneous), or by forbidding the exchange of

commodities whose existence proved either uncertain or nonexistent at the moment of the settlement. Thus, excessive gain in the form of *ribā* creates a high risk situation for both creditor and debtor and has thus been forbidden. All those regulations notwithstanding, individuals and families that were able to accumulate enough surplus so as to afford such risks of lending and borrowing at high rates were able to circumvent the Ḥanafī type of settlements. Moreover, since any contractual settlement encounters the obvious difficulty of knowing whether the promisee will perform and whether his promise is legally binding (assuming of course that the terms of the agreement were equally accepted on both sides)—what American common law labels as a "consideration" of the original offer—customary practices play a crucial role in determining a valid (linguistic) framework for all kinds of agreements. In short, even though contractual variety might end up creating a rigid system of exchange, one that subjected all parties to numerous constraints, it at least attempted to protect them from risk, uncertainty, and high transaction and information costs. Moreover, such constraints were bypassed at several levels: either in the legal work of judges and jurists, or in the judicial decision making of the courts, hence the sheer size of the legal texts which tended to grow out of proportion while finding ways to bypass the rigid precepts of tradition.

The divisions and hierarchies within the Ottoman legal system, mainly in terms of a conglomeration between sultanic legislation and Ḥanafī practice, turns out to be a cost saving device. In fact, the sharī'a court system was no more than a "private" and "communal" system of adjudication towards which the state manifested very few scruples beyond a limited desire to control the appointment of judges (even though our data points, at least for the first half of the nineteenth century, to a quasi-autonomous process within the *a'yān-'ulamā'* group to control access to judgeship appointments from within), so that the evolution of that system, especially to anything related to contract and property, was left within the insurmountable bounds of *taqlīd,* to the point that much of the venerable Ottoman land tenure issues and their legal formulation (based on sharī'a law) was left outside the scope of the fiqh manuals (see Chapter 4). As a matter of fact, interfering in the practices of the courts did not represent any real advantage to the state authorities, or the local bureaucracies for that matter, considering that the system was designed to minimize cost by working out all kinds of contractual settlements, all of which attempted to reduce risk to its bare minimum. Property rights were crafted accordingly, meaning that the appropriate legal device was found whenever the irrevocable nature of a private property was at stake. Thus, when by the second half of the nineteenth century, and in particular with the promulgation of the 1858 Land Code, the social and material conditions became more favorable for the commercialization of private property, the sharī'a courts lost the most crucial part of their business.

In contrast to the "private" adjudication of the courts, the institutions of the qānūn were more concerned with transactions between individuals and groups outside narrow family circles, quite often involving the state or a quasi-state agent as an alternative party. In such cases the transaction costs could prove high (primarily because negotiations between poorly connected parties might prove inefficient), thus precluding any efficient bargaining, while leaving the final arbitration to quasi-official institutions like the regional councils. The more tortured adjudication of those councils only reflects the difficulties of placing non-related parties at the same bargaining table. By contrast, the adjudication of the sharī'a courts shows much more elaborated pre-contractual (*ex ante*) settlements. Those were typically either constrained within the same family or clan, or else were kept within a network of families with extensive marriage alliances. Thus, in order to minimize transaction costs, which were very different from and marginal to production costs, clans were either constrained to their endogamous practices (e.g., the Shihābs), or nurtured inter-familial alliances through well thought out marital strategies (e.g., by marrying into families situated lower within the hierarchy, or by absorbing new comers to the region, in particular merchant groups and the *nouveaux riches*). The sharī'a documents of both Damascus and Beirut were replete with contractual settlements, worked out through elaborate procedural fictions, which translate the ambitions of such groups in securing property transactions between generational networks.

The control over the circulation of commodities and their access was a de facto control over contractual settlements and rights, primarily, though not exclusively, property rights. Why should such a control prove necessary? Not only were the resources limited, but more important, their access was even more limited. Access to such resources had to go through the usual political networks dominated by kin, so that the latter acted as protective shells that pushed all transaction costs high enough to make them exorbitant for anyone outside the network. In fact, there was a cost embedded in access, so that when costs were high, access was protected, if not monopolized by a group. In effect, whenever transaction costs for a particular contractual settlement became unusually high, access was then severely limited. Contractual settlements through procedural fictions became the norm whenever access to particular goods, services, or rights (in particular property rights) were so exorbitantly limited that a new generation of urban capitalists pushed towards more flexibility. There might not be enough incentives to push for greater benefits whenever the costs were perceived to be greater than the benefits.

To summarize, contractual settlements are the most crucial element in any society to secure specific property rights. However, only a combination of legal and economic concepts could bring contract and property together. (1)

Contracts have been mostly studied as tools of exchange regardless of the property rights they could engender. (2) Contractual settlements have often been limited to what the law manuals would permit, thus totally obscuring the role played by procedural fictions in extending the scope of traditional contracts. (3) Contracts have been mostly perceived in terms of the value of the exchanged commodities, but regrettably not enough in terms of their transaction (marginal) costs, namely, the costs of negotiating, monitoring, and enforcing contractual agreements. Those prove even more crucial for the types of societies under consideration in that they explain all the "protective" legal framework of contracts, expressed in the great variety of contractual settlements, all of which tend to minimize risk and excessive loss, not to mention the protectiveness of groups through their exclusivist policies and privileges accorded to their own networks. Which brings us to our final point, (4) a study of contractual settlements and their correlative property rights necessarily leads to political formations, not only in terms of discourse and ideology, but also in terms of the power relations they institute based on the property rights they aim at protecting.

The existence of the state, and the entailing discourses and ideologies, political networks, and local (regional) bureaucracies, whether strong or weak, partial or total, centralized or decentralized, should be looked upon in terms of the property rights that they attempt to enforce, and hence, indirectly, of the contractual settlements that make the latter possible. Thus, a strong centralized state, in the European and North American tradition, by enforcing unified contractual regulations, minimizes the transaction costs to the contracting parties. That could be achieved in several ways, but primarily a "unified" norm implies that other much "weaker" norms based on custom, region, and kin, have been outlawed in favor of a more coherent and rationalized normative values. But a society would only go that way—a transformation that in Europe took several centuries—when the material conditions that make the acquisition and preservation of private property have become affordable. Thus, technical innovations such as irrigation projects and the expansion of the railway networks, in conjunction with the rationalization of the judicial decision-making process, all help and contribute in the fostering of private property and laissez-faire economics at lower costs. In short, the existence of a strong centralized state, which only happens in conjunction with a formalization of all norms at a national level, helps in the minimization of transaction costs, relative to the gains from bargaining, so that inefficient assignments of rights will be overcome through the bargaining process.

The case of the Ottoman state turns out quite different. First, the centralization and decentralization dichotomy cannot be used without conceptual ravage. In fact, there was no period in Ottoman history, except perhaps for the Tanẓīmāt,

where the imperial state had attempted to create and impose a coherent set of normative rules. The reverse was rather true: all Ottoman history consisted in keeping all kinds of social groups (*ṭawā'if, millet*s, *za'āmāt, a'yān* and *'ulamā',* etc.) within their own normative rules, while some higher norms had to be imposed solely on a regional/territorial basis for fiscal purposes. The integration of Ottoman societies thus took place first and foremost at the communal level, and was kept there for the most part without much state intervention. This is not much of a philosophical and political decision as much as one related to cost alternatives. The imposition of a single set of normative values, enforced and implemented by the imperial state, would have turned into a costly enterprise, and all the material conditions notwithstanding, was not worth implementing unless there were clear benefits that would outweigh all costs.

The aim of this book was to view adjudication and judicial decision making as totalities, whose effect would appear *tout ensemble* only in conjunction with the set of topoi and idioms which the Ḥanafī scholars had formulated throughout the history of their school. The issue that concerned us the most was the epistemic grounds upon which knowledge in such societies rested. That issue is important not only in regards to how the Ḥanafīs formulated their own views of the school, society, language, and law, but more important, the way such notions endlessly reverberated through all kinds of practices that formed the core of judicial decision making, such as witnessing, constructing evidence, procedures, and fact finding (or lack thereof). The foundations of knowledge (*'ilm, ma'rifa*) thus help us understand some core activities that even go far beyond the judicial as such, such as the religious, political, and economic, all of which are non-dissociable from one another.

The judiciary system analyzed in this book was also the last of its genre—*fin de siècle*—and by the second era of reforms much of it failed to survive. The epistemic grounds of knowledge becomes an even more crucial issue with the "reception" of modern western European codes and their implementation—sometimes side-by-side with the old practices—within the judiciary. When codes change, the old ones become obsolete, and for this very reason, Ḥanafism and the Majalla and its general rules, are all past history, save for some limited personal status matters. But the implementation of new codes, however, is not necessarily an indication that the old epistemic notions have become de facto obsolete. Indeed, such notions are the hardest to change and ought to be looked upon on a *longue durée* basis as a bottom layer over which other layers come and go. The modern Middle Eastern systems would then be looked upon in conjunction with the Ottoman practices, which in spite of the fact that their procedures and opinions are no longer in force, still survive beneath the common surface of events.

Appendix 1
Structure of Ibn ʻAbidin's *Radd*

Muḥammad Amīn Ibn ʻĀbidīn, *Ḥāshiyat Radd al-muḥtār ʻala ad-durr al-mukhtār: Sharḥ tanwīr al-abṣār fī fiqh madhhab al-imām Abī Ḥanīfa al-Nuʻmān,* 8 vol. (Mekka: al-Maktaba al-Tijāriyya, 1386/1966).

The unfinished eight-volume treatise is a *ḥāshiya* to Ḥaṣfakī's *Radd al-muḥtār.* Volumes 7 and 8 were completed by the author's son.

Each kitāb (book) contains several bābs (sections) and maṭlabs ("requests"), but not all are listed below.

Sections extensively commented upon in this study are in bold.

VOL. 1: religious rituals

Introduction
Muqaddima, 35-78
on various issues of the madhhab, custom and language, *ikhtilāf, ṭabaqāt, taqlīd, ijtihād, ẓāhir al-riwāya,* etc.
Kitāb al-ṭahāra, Book of purity, 79-350
Bāb al-miyāh, water, 179-228
Bāb al-tayammum, intention (intending to), 229-259
Bāb al-ḥayḍ, menstruation, 282-307
Bāb al-anjās, impurity, 308-350
Kitāb al-ṣalāt, prayer, 351ff
Bāb al-ādhān, call for prayer, 383-403
Bāb shurūṭ al-ṣalāt, stipulations for praying, 404-440
Bāb ṣifat al-ṣalāt, the essence of the prayer, 441-546
Bāb al-imāmah, leadership, 547-598
Bāb al-istikhlāf, appointment of successor, 599-662

VOL. 2: mostly religious rituals

Bāb al-watr wa-l-nawāfil, evening prayers and the superfluous, 3-49
Bāb idrāk al-farīḍa, knowledge of religious duties, 50-61
Bāb qaḍā' al-fawā'it, completing what has been missed, 62-119
Bāb ṣalāt al-musāfir, prayer of the traveler, 120-164
Bāb al-'īdayn, the two feasts, 165-183
Bāb ṣalāt al-khawf, prayer of fear, 186-189
Bāb ṣalāt al-janā'iz, prayers in funerals, 189-246
Bāb al-shahīd, the martyr, 247-255
Kitāb al-zakāt, almsgiving, 256-324
Bāb al-'ushr, tithe, 325-338
Kitāb al-ṣawm, fasting, 369-452
Kitāb al-ḥajj, pilgrimage, 453-627

VOL. 3: marriage and divorce

Kitāb al-nikāḥ, marriage, 3-225
Kitāb al-ṭalāq, divorce, 226-638
Kitāb al-'itq, manumission, 639-701
kitāb al-īmān, belief, 702-850

VOL. 4: punishments and pecuniary transactions

Kitāb al-ḥudūd, punishments, 3-81
Kitāb al-sariqa, theft, 82-118
Kitāb al-jihād, holy war, 119-174
Bāb al-'ushr wa-l-kharāj wa-l-jizya, tithes and taxes, 175-194
Faṣl fi-l-jizya, tax on minorities, 195-220
Kitāb al-laqīṭ, foundling, waif, 269-275
Kitāb al-luqṭa, article found, 276-285
Kitāb al-ibāq, absconding of slave, 286-291
Kitāb al-mafqūd, lost objects, 292-297
Kitāb al-sharika, partnership, 298-336
Kitāb al-waqf, trusts am mortem, 337-499
(*sharṭ al-wāqif ka-naṣṣ al-shāri',* importance of custom, 433/4, etc.)
Kitāb al-buyū', buying and selling, contract of sale, 500-604

VOL. 5: pecuniary transactions

Bāb khiyār al-ʻayb, option from defect, *actio empti,* 3-49
Bāb al-bayʻ al-fāsid, voidable sale, 49-118
Bāb al-ifāla, 119-131
Bāb al-murābaḥa wa-l-tawliya, markup contract, 132-167
(on debt as *dayn* and *qarḍ,* etc.)
Bāb al-ribā, usury, 168-187
Bāb al-ḥuqūq, rights, 187-189
Bāb al-istiḥqāq, vindication of immovable property, 190-208
Bāb al-salam, payment in advance, 209-225
Bāb al-Mutafarriqāt, miscellany, 226-256
Bāb al-Ṣarf, money exchange, 257-280
Kitāb al-Kafāla, guarantee, 281-339
Kitāb al-Ḥawwālah, transfer, 340-350
Kitāb al-qaḍāʼ, judging, 351-460
Kitāb al-shahādāt, witnessing, 461-508
Kitāb al-wakāla, representation, 509-540
Kitāb al-daʻwa, lawsuit, 541-587
Kitāb al-iqrār, acknowledgement, 588-627
Kitāb al-ṣulḥ, peaceful settlements, 628-644
Kitāb al-muḍāraba, sleeping partnership, 645-661
Kitāb al-idāʻ, delivery, 662-675
Kitāb al-ʻāriya, lending, 676-687
Kitāb al-hiba, donation, 687-711

VOL. 6: transactions & homicides

Kitāb al-ijāra, rent, 3-96
Kitāb al-mukātab, slave with a manumission contract, 97-118
Kitāb al-walāʼ, submission, 119-127
Kitāb al-ikrāh, duress, 128-141
Kitāb al-ḥajr, inhibition, 142-153
Kitāb al-maʼdhūn, the permitted, 154-176
Kitāb al-ghaṣb, unauthorized use, 177-215
Kitāb al-shufʻa, pre-emption, 216-252
Kitāb al-qismah, assessment of wills, 253-273
Kitāb al-muzāraʻa, sharecropping, 274
Kitāb al-musāqaāt, sharecropping over planted lands, 285-292
Kitāb al-dhabāʼiḥ, slaughtered animals, 293-310
[...]

Kitāb al-jināyāt, homicides, 527-572, 647-726
Kitāb al-waṣāyā, wills, 647-757
Kitāb al-khuntha, hermaphrodite, 727-757
Kitāb al-farā'iḍ, successions, 757-815 (end of book 6).

VOL. 7: transactions

Both volumes 7 and 8 are known as *Qurrat 'uyūn al-akhbār: Takmilat radd al-muḥtār,* and completed by Muḥammad 'Alā' al-Dīn Ibn 'Ābidīn, and both reproduce sections already in the original *Radd.*

Miscellanea, 3-61
Kitāb al-shahādāt, witnessing, 62-263 (addendum to 5:461-508 *supra*)
Kitāb al-wakāla, representation, 264-397 (5:509-540)
Kitāb al-da'wa, lawsuit, 398-503 (5:541-587)

VOL. 8: transactions

Bāb da'wa al-rajulayn, lawsuit of the two men, 3-94
Kitāb al-iqrār, acknowledgment, 95-215
Kitāb al-ṣulḥ, peaceful settlements, 216-275
Kitāb al-muḍāraba, sleeping partnership, 276-327 (5:645-661)
Kitāb al-īdā', deposition, 328-380 (5:662-675)
Kitāb al-'āriyah, lending, 381-418 (5:676-687)
Kitāb al-hiba, donations, 419-498 (5:687-711)
***maṭlab fī ma'na al-tamlīk,* ownership, 498-511 (end).**

Appendix 2
Ibn ʻAbidin's Epistles

Muḥammad Amīn Ibn ʻĀbidīn, *Majmūʻat rasā'il Ibn ʻĀbidīn* (Beirut: Dār Iḥyā' al-Turāth al-ʻArabī, n.d.).

The Beirut facsimile edition of Ibn ʻĀbidīn's *rasā'il* was poorly edited—no surprise! First (besides the fact that this edition has no date), the table of contents only headlines the *rasā'il* in part two, and even that comes with the wrong page numbers! In fact, this single volume is in two parts, each containing a different set of *rasā'il.* In part one, which does not have a table of contents, the "epistles" were *originally* numbered, from one to fifteen; while part two has sixteen more but left without numbers (apparently an omission in the original manuscript itself, or in the first printed edition).

Part one

Bolded chapters with an asterisk have been extensively used in this study, in particular in Chapters 1 & 2. Those with an asterisk only have also been subject to analysis.

1. Short piece (2-8), sort of general introduction to the work.

2*. Fundamental epistle, referred to as *manẓūma,* and one of the longest of the set (9-53), but also one of the most important because of its general claims. In fact, Ibn ʻĀbidīn establishes the "method" through which opinions were made and unmade; the role attributed to the *uṣūl* and *furūʻ;* the hierarchy (*ṭ abaqāt*) between the various brands of scholars, those who push hard for personal interpretation, and their followers (the *mujtahid*s and the *muqallid*s); the significance of differences of opinions between the three founders; how "necessity" (*ḍarūra*) could force an opinion contrary to what the founders said; why custom was important, and why understanding the linguistic customary practices within a community was important.

In short, this epistle, with the curious title of "*'Uqūd rasm al-muftī,*" is a fundamental piece describing how the system works in terms of 1) the hierarchy between the various historical opinions; 2) the importance of custom in creating—and forcing the system—into new opinions; 3) and as a result of custom, why some opinions became untenable and obsolete thus forcing the system into new ones—out of "necessity" (*ḍarūra*)—even though they might not conform to the basic rule of analogy (*qiyās*); and finally 4) the importance of language in understanding customary practices.

In addition, all the above should be connected to contract, obligation, and restitution. Since most of our cases are property oriented, it is fundamental that we understand the legal implications of debt, damage, assessment, evaluation, *daf'*, and the like.

3. The third epistle, "al-Fawā'id al-mukhaṣṣaṣa bi-aḥkām Kay al-Ḥumṣa" (54-67), is concerned with the blood that comes on one's head from a cut and how this might affect ablution. An interesting *risāla* on the anthropology of the body.

4. A long essay on the issue of *ḥayḍ* (68-119).

5. An essay on body positions during praying (120-137).

6. An essay on praying and *takbīr* (138-151).

7*. On the right of receiving an *ujra* ("fee") on reciting, teaching, and reading the Qur'ān (152-207), and also on wills (*waṣāyā*), rulings, etc. Should be read in conjunction with our previous findings on rulings and custom.

8. One page (208) letter.

9. Epistle on the "seeing" of Hilāl Ramaḍān (209-231).

10. Also on Ramaḍān (232-240).

11. On *ujra*s for nursing (*ḥaḍāna*) (242-254).

12*. On the notion of *qarāba.* Should be read in conjunction with successions and wills and in the context of all the family cases in the sharī'a courts (255-269).

13*. The importance of *lafẓ* and how it necessarily connects to custom (269-283).

14. On sin (284-291).

15. [*in part] On the *murtadd*s ("renegades") and those who converted to Islam: *qubūl tawbat al-murtadd* (292-349). Parts of the *risāla* (326ff) on how judges should rule on the renegades could be relevant for adjudication (291-349).

Part two

1. Dividing the revenues of a waqf (2-16).

2*. Epistle on what was meant by the term *ʻala al-farīḍa al-sharʻiyya* in the *kitāb al-waqf:* Did it imply that, as was the case for successions, women as beneficiaries of the waqf's revenues should have half of the males or an equal amount, as some jurists argued? Ibn ʻĀbidīn's reply was blended with his notions on language and custom (18-32).

3*. The notion of *aqrab* (the closest kin) in the waqf (33-45).

4. When two decide for a self-bequeathed waqf, it ought to be considered as one rather than two (45-54).

5*. On money and its value (*"Tanbīh al-ruqūd ʻala masʼalat al-nuqūd"*) (55-65). The epistle follows Ḥanafism in general by not questioning money (*naqd, nuqūd; ʻumla, ʻumulāt*) as such, but limits itself only to potential problems that might arise whenever a contract includes a monetary exchange. Such problems are reduced to two sorts: either the currency has lost some of its value by the time the contract is fulfilled, or else it has been abandoned totally in the locality in question as a tool for evaluation and exchange. In either case, the contracting parties should stick to the original modalities of the contract and reassess the new currency in terms of the old.

6. *Ṣiḥḥat al-faskh bi-khiyār al-ghibn al-fāḥish:* On the right of non-performance when the other party has pushed for excessive gains (65-82).

7*. *Buṭlān al-Ḥukm bi-naqḍ al-daʻwa baʻda al-ibrāʼ al-ʻāmm:* detailed case of the Jew Raphael (83-93).

8. *Masʼalat al-iqrār al-ʻāmm:* when an inheritor acknowledges that he or she received all their dues from a succession (*tarika*) (94-111).

9*. On custom and habit (112-145).

10. On rent: the first tenant should be privileged (146-163).

11. On the distribution of a waqf's revenues (164-178).

12. Poetry (179-184).

13. On the rules of inheritance (186-276).

14. On praying rituals (277-283).

Glossary

ʿāda	habit
ālat al-qatl	tool-of-killing
ālat ḥādda	sharply edged tool, considered enough for Ḥanafīs to determine intentional killing
ʿāqila	"professional milieu" of a culprit charged of homicide, and which might be requested by court action for a partial or total payment of the blood money
aʿyān, s. *ʿayn*	notables (in pl.), also tangible objects (s. or pl.)
abūkāt	from the French avocat, lawyer; introduced by the second half of the nineteenth century due to the nonexistence of professional lawyers prior to that period
adab al-qāḍī	the rules of judicial decision making
ʿadam	the nonexistence of a thing
aḥyā	to cultivate a land that was left over as mawāt
ahālī, ahl	people of a locality
ajnabī	foreign, someone outside the agnatic group per se
ajzāʾ	bodily parts, or more generally, fragments
al-milla al-rāfiḍa	"the confession of refusal," meaning the Shīʿīs
ʿamār	buildings, built area either in the city or countryside
ʿamd	intentional killing
amr	order
amwāl al-aytām	funds of orphans
amwāl amīriyya	taxes and surtaxes due to the state
ankara	to deny
arḍ	land
arḍ-u al-kharāj	land subject to the *kharāj* (q.v.) tax
arshad	the most "mature" among all beneficiaries
ʿaṣaba	kin, agnation, consanguinity, blood relationship
ʿaṣabiyya	group feeling
aṣl	essence
ʿashīra	clan
awāmir sulṭāniyya	sultanic orders, ordinances
ʿayn, pl. *aʿyān*	tangible object, and in its plural form the notables of a city

bāṭin	intrinsic or hidden meaning, or the inner side of the manifest meaning (bāṭin)
bay‘ al-wafā‘	sale with a right of the seller to repurchase (redeem) the property by refunding the purchase price
bayyina	evidence
burhān	proof
bustān	garden, a small cultivable land in the vicinity of the city
çiftlik	farm or mazra‘a
ḍārib	assailant
dīwān	the paperwork of the judge in the classical Islamic systems; became referred to as sijill in Ottoman times
dār	home
da‘wa	lawsuit
dalīl	evidence, indication
dayn	debt
dayyān	lender
defter, Arabic *daftar*	Turkish for register
defterdār	higher Ottoman official whose authority within a province was next to the governor (wālī)
dukkān	shop
dustūr	law, constitution, codes
faqīh, pl. *fuqahā’*	jurist, practitioner of the fiqh
farā’iḍ	branch of the fiqh devoted to successions and the division of an inheritance fairly among its beneficiaries
fatwā, pl. *fatāwā*	responsum delivered by a jurisconsult
fiqh	jurisprudence, legal school, also “knowledge”
ghaṣb	unlawful usurpation
ḥāditha	event
ḥādithat al-fatwā	a unique occurence—or event—that prompted a muftī’s fatwā (q.v.)
ḥānūt	small shop
Ḥanafī	one of the four schools of the Sunnī fiqh, adopted by the Ottomans as their official legal system
ḥaqq	right, obligation
ḥaqq ‘aynī	the right over the tangible object, which is accorded once the property passes from seller to buyer
ḥaqq shakhṣī	personal right, a modern notion taken from Roman law
ḥīla, pl. *ḥiyal*	legal subterfuge, procedural fiction (see Table 2-2)
ḥujja	record of a transaction or a contract
ḥukm	ruling
‘ibādāt	religious rituals
ijmā‘	consensus
ijtihād	act of independent reasoning and interpretation excercised by a mujtahid (q.v.)

'ilm	knowledge based on the scriptures
'ilm al-fiqh	jurisprudential knowledge
'ilm al-kalām	theology
iltizām	Ottoman tax-farming system, or rent-payment system through the multazim
imām	head of a school, sect or group
inkār	denial
irth	inheritance
istibdāl	property substitution for the purpose of benefiting a waqf (q.v.)
istiṣnā'	contract providing for the manufacture and purchase of a specified item
ithm	sin, offense
jamā'a	group of people
jināya, pl. *jināyāt*	the act of the killing of a soul (nafs); a homicide
kīs	"bag," or 500 piasters
kātib	scribe
kalām allāh	the word of God, the Qur'ān
kashshāf, mustakshif	someone who "explores" a homicide scene at the request of a judge
khāne	the Ottoman household unit for taxation purposes
kharāj al-muqāsama	"tax" imposed in the early Islamic empires in which the peasant shared part of his produce for using state-owned lands
kharāj al-waẓīfa	land flat-tax in the early Islamic empires, or the "rent" for using state-owned lands
khaṣm	opponent
khaṣm jāḥid	denying opponent
khaṭa'	error
khuṣūma	conflict that led to a litigation
kitāb	book, section of a manual
liwā'	administrative unit of a province
mīrī	Ottoman land-tenure system, state-owned lands
mālikāne	land granted as a life-appointment
ma'dūm	nonexistent
ma'na bāṭinī	hidden intrinsic meaning
ma'na ḥaqīqī	literal and manifest meaning
ma'na majāzī	metaphorical meaning
madhhab	school of jurisprudence (fiqh)
maḥall al-'aqd	the licit object of legal obligation
mahjūr shar'-an	legally abandoned
majālis al-Tanẓīmāt	the regional councils of the Tanz˝īmāt (q.v.)
majlis, pl. *majālis*	place of meeting to contract, or to conduct a hearing (courtroom), or, more generally, a place of assembly such as a parliament or council
maqṭū'	lump-sum payment of a tax

marṣad	"investment" that a tenant would make in a waqf's property to secure a long lease
mashāyikh al-ṭawāyif	elders of a confessional group
mashadd maskeh	right of cultivation, and which the tenant must purchase from the previous tenant in order to compensate the latter for the invested labor and to transfer that right
maṭlab	request made to a scholar and for which he is expected to issue a responsum
mawāt (pl.)	dead lands, which might be unsuitable for cultivation and left as such for a long period of time; always used in plural
mawqūf	the blocked properties dedicated to a waqf (q.v.)
mawqūf ʿalayhim	the beneficiaries of a waqf (q.v.)
mazraʿa	farm; equivalent to the Turkish çiftlik
milk	private property
milla, Turkish millet	confessional and political system of the Ottoman Empire in which various religious groups (ṭā'ifa, millet) were provided "autonomy" within the system at large
mūjib, pl. *mūjibāt*	obligation
muʿāmalāt, s. *muʿāmala*	pecuniary transactions
mubāḥ	permitted, permissible
muddaʿī	plaintiff
muddaʿī ʿalayhī	defendant
muftī	jurisconsult
muḥaṣṣil	person responsible for collecting taxes and surtaxes in a locality or region, and considered of a higher status to the multazim (q.v.)
mujarrad	single, bachelor, classification mostly used for statistical purposes
mujtahid	genuine interpreter and scholar who relies on his own independent reasoning
multazim	Ottoman tax-farmer
muqāṭaʿa, pl. *muqāṭaʿāt*	Ottoman tax-unit granted to a tax-farmer by auction
muqallid	a scholar of lower rank who cannot rely on his own reasoning and therefore follows a mujtahid
murābaḥa	markup contract of sale
mushāʿ	commonly owned property
mutakallimūn	theologians
mutawallī	waqf's administrator
nāḥiya	smaller administrative division to the province
nā'ib al-qāḍī	deputy judge
nāẓir	waqf's administrator
nafs	soul
naṣṣ	text, or Text, as in the case of a text of divine nature
nawādir	less authoritative works of the school, literally "rarities"

niyāba ʻāmma	public prosecution office, which was nonexistent in Ottoman times
niyya	intention
qāḍī	judge
qāḍī al-quḍāt	chief judge
qānūn	law, statute, official legal text emanating form teh imperial center (sultan)
qānūnnāme	set of regional codes legislated by the Ottoman bureaucracy and which acted in parallel to Ḥanafism
qaḍa	to rule, to draft a final decision
qaḍā'	religious office or function of the judge
qarāba	kin
qarḍ	loan
qaṣd	purpose, an intended action
qawāʻid kulliyya	the general rules of Ḥanafism, formulated explicitly for the first time by Ibn Nujaym
qawad	punishment
qawl	authorized opinion by a recognized scholar
qiyās	reasoning by analogy
quṣāṣ	punishment
rāshid	the most mature among the beneficiaries
raʻiyya, raʻāyā	in singular or plural refers to the "subjects" of the Empire who are perceived as a "flock" on the top of which rules a sultan as a "guardian" to his "subjects"
raf' yad	to vacate a property that has been subjected to unlawful usurpation
ribā	usury
ribḥ	gain, profit
ribḥ fāḥish	excessive gain
rujūʻ ʻan al-waqf	act of revoking some or all of the original stipulations of a waqf (q.v.)
ṣāḥibayn	the two companions, meaning Abū Ḥanīfa's two disciples, Abū Yūsuf and Shaybānī
ṣulḥ	settlement
salīkh	land with no plantations
salam	advance loan; purchase of item known by specification or description for delivery at a later specified time, with payment of price in full at time of contract
sanjāq	province, administrative division
shāhid	witness
shaddād, pl. *shaddādūn*	special category of peasants protected by various forms of legislation and by the regional councils
shahāda	testimony
shar'	canon law based on the scriptures
sharḥ	interpretation

sharḥ adab al-qāḍī	intepretation of the rules of judicial decision making
sharṭ mulā'im li-l-'aqd	conditions appropriate to the contract
shibh al-'amd	quasi-intent
shurūṭ	stipulations, conditions
shurūṭ al-tazkiya	conditions of approval
shurūṭ, s. *sharṭ*	stipulations
sijill, pl. *sijillāt*	court register; name associated with the "bound" registers of the Ottoman sharī'a courts, thus replacing the classical unbound dīwāns
sulṭa	power
sulṭān	head of a ruling dynasty
ṭā'ifa	religious group, a corporation, a craft-guild
ṭabaqa, pl. *ṭabaqāt*	generation of scholars, bio-biographies based on a specific juristic typology of the school
taghyīr wa-l-tabdīl	changes that might have been introduced in the origininal act of a waqf (q.v.)
tajdīd	the renewal of a tradition based on a new interpretation
takhrīj	a form of reasoning and interpretation by analogy
tamlīk al-'ayn	ownership of the tangible object, transmitted through a contract of sale
tamlīk al-buḍa'	possession of the husband of his wife's genatalia, which for Ḥanafīs was granted through the contract of marriage
tamlīk al-dayn	ownership of the debt which entails for the borrower an obligation to reimburse
tamlīk al-manfa'a	ownership of the usufruct as a result of a tenancy contract
Tanẓīmāt	Ottoman reforms which began with the edict of 1839
taqlīd	the following of a tradition based on already established opinion
taqlīd	the following of a tradition
tarika	succession
taṣarruf	right of possession
tawkīl	contract of representation
'ulamā', s. *'ālim*	corporation of the scholars of Islam
'umla	money, currencies
umūr 'āriḍa	contingent matters
'urf	custom, linguistic custom
'uṣba	community
uṣūl al-fiqh	the basic rules on which a legal school is based
'ushr	the old classifical form of tithe, or one-tenth of the produce
verghi	"impôt foncier," equivalent to 4/1000 of the value of lands subjected to the 'ushr (q.v.)
wālī	governor of a province appointed by the imperial center
wāqif	founder (benefactor) of a waqf

waḍ' yad	occupation, a common Ḥanafī notion that gives the right of "possession" to anyone who has worked on a land for a period of time
wakīl	representative
walī al-dam	next of kin of a murdered victim
waqf, pl. *awqāf*	blocked properties whose "usufruct" is the property of its beneficiaries
waqfiyya	the document where the stipulations of a waqf are drafted
waṣiyya	will
yatīm, pl. *aytām*	orphan
ẓāhir	manifest meaning, in opposition to its intrinsic meaning (bāṭin)
ẓāhir al-riwāya	a Ḥanafī term to denote the uṣūl al-fiqh of the school based on Shaybānī's six manuals, which were agreed upon by later jurists
zakka	to approve
zukkiyat al-bayyina	evidence has been validated

Bibliographical essay

The reader might be surprised to realize that most of the references listed below are only indirectly linked to the topic of this book. In fact, the present bibliography is divided into several headings—even though all titles were kept alphabetically—but none which comes close to judicial decision making in Islamic, Ottoman, and Middle Eastern societies.

1. Studies on Islamic law have grown considerably in the last decades, and some of the work shows contributions from scholars who were not originally trained in the field, which brought an important intellectual challenge from other disciplines. All of this has considerably enriched studies in Islamic law, and gave it a new impetus since the early contributions of Joseph Schacht, N.A. Coulson, and Chafik Chehata. But the facile progress also came at a price, in particular when it comes to the study of individual works and authors, many of whom see their works sporadically quoted without, however, the care to analyze such a material systematically. Thus, for the purposes of this study, when I began focusing on Ibn Nujaym, Ibn ʿĀbidīn, and the Ottoman Majalla (1877), I realized that not only were there were no independent studies on their place within the Ḥanafī school, but even articles devoted to their lives or aspects of their works have still yet to materialize. Only recently an article on Ibn ʿĀbidīn by the late Norman Calder (2000) has been published, and regrettably only after his untimely death. Researchers tend to find the fiqh manuals, in all their variations, hard to deal with on an individual basis, so there is a general tendency at the moment to bypass such individualities in favor of broader themes, larger periods, and a multitude of texts that would point to a particular trend at a specific juncture. Even though such research has its own merits, it comes at the price of neglecting the essential, namely, the structure and discursive formations of individual texts and authors. This should be the case, whatever the origin of those texts, whether emanating from individual scholars, or bureaucratic institutions, or sharīʿa courts. I've argued in this book that texts have a "personality" of their own, hence share a common "mode of thought," even if they remain non-associated with a single "author." A lot of work needs to be done—in particular for a practice like the fiqh which relies so heavily on layers of interpretation—to trace all the chains of transmission (*isnād*) and their relevance at a specific historical juncture. We need to know how individual scholars use the work of their predecessors (which ones specifically, and what determines their choices), their logic of selecting opinions, and then how those selected opinions combine to form new texts, and where the scholar's "own" contribution is finally situated.

2. The field of Ottoman law is much more constrained than that of Islamic law, and, as a result, it has not yet witnessed the boom of the latter, so that since Uriel Heyd's edited lecture notes on criminal law (1973), only Baber Johansen's studies on Ḥanafism under the Ottomans (1988, 1999), and Colin Imber's superb biography of Ebu's-suʿud (1997), and more recently Wael Hallaq's surprising findings on the Ottoman "*sijill*s" (1998), were among the rare instances where aspects of "Ottoman law" have come under the microscope. Such large gaps in our knowledge make it even more difficult to assess discursive formations historically through an evolutionary pattern that would look at the Ottoman judiciary in its totality. Brannon Wheeler's

recent study (1996) on the logic of transmission (*isnād*) of opinions among Ḥanafīs is essential to understand the logic of organization of knowledge within the school, and its self-reliance on its own corpus since its first maturity by the fourth/tenth century.

3. More relevant, however, is the serious flaw which has emerged in Ottoman legal studies as a result of the vast socio-economic literature, which shaped in the last few decades our vision of the Empire, but which has used all kinds of "legal" texts ("records")—in particular the sharī'a courts and other regional councils—while bracketing off their "legal" context. Thus, all those "records" in all their varieties were neither used as texts nor on a case-by-case basis, thus making it impossible to discern, even remotely, the legal structure of those cases. But in the Ottoman sharī'a system it is difficult, if not impossible, to know "winners" from "losers," and judges favoring one party over another and thus ruling in one direction, unless we discern first the whole structure of the case (or its syntax). Many of those cases have no winners and no losers as such because they were nothing but friendly property transfers, while other properties were transmitted to women for the sake of preserving the property from an internal takeover by rival clan members, or to minimize the ravages of confiscation by state or local authorities. In short, even the "economic" implications of those texts could only be discerned through their inner strategies and nuances. Moreover, an analysis of cases as texts, whether in their legal or extra-legal contexts, would push socio-economic history to new dimensions, ones that would at least integrate its material in narratives where the "voice" of the original narrators is also alive and present.

4. Modern technology now enables students of the archives of the Ottoman Empire to reproduce them faithfully with minimal cost, if granted the permission to do so. Obviously, reproduction provides us with a *permanent* access to a text, which means successive revisions in analysis and interpretation in conjunction with one's writing. Moreover, such an access allows for a continuous revision and a rethinking of court documents in conjunction with the enterprise of the fiqh, which implies a great deal of back and forth reasoning between texts of a different nature, but which nevertheless shares at times similar concerns. In short, the permanent access to documents through their reproduction is the *sine qua non* of any serious textual analysis, and the hope for creating a niche in that direction—one that favors language and discourse—in the midst of a literature that favors browsing-by-numbers.

I have described elsewhere (Ghazzal, 1993) the status of the Ottoman Syrian archives in Damascus, and in Chapter 5 (note 1) the difficulties of accessing the Beirut registers. In both cities, however, I was able to photocopy what I needed, or to do photographic reproductions, so I had permanent access to all the documents used in conjunction with this book, which was indeed a privilege.

5. The law and economics schools stand in good shape in the United States (Mercuro and Medema, 1997), but are much weaker in Europe, and practically nonexistent in the Middle East. Yet, surprisingly, and despite that Max Weber's *Economy and Society* went in this direction since the turn of the last century (Swedberg, 1998), hence earlier than anyone else, the American schools in all their varieties even fail to admit this fact, or to reconsider the Weberian comparative perspective and its theory of rationalization in light of common law. In conjunction with Weberianism, which presents a much more richly balanced picture of non-Western societies in their difficulties to rationalize, I became interested, through the so-called neoinstitutional law and economics, in the idea that *contracting* is the process through which property rights are established, assigned, or modified. Such a concept plays well in the context of the Ottoman Empire, especially in the context of an underdeveloped law of property, which, paralyzed by the massive state ownership and the status of mīrī lands, was able to effect contractual settlements through the procedural fictions of the courts, enabling individuals to guarantee more property rights, reorganize them while bypassing the limitations of the rules of inheritance, and also bypass even more limitations within contracts themselves.

Neoinstitutional scholars typically associate the beginnings of their efforts to two seminal articles by Ronald H. Coase: "The Nature of the Firm" (1937), and "The Problem of Social Cost" (1960) (reprinted in Coase, 1988), which led him to the reception of the Nobel Prize in Economics in 1991 (it takes time to admit a discovery). Since then, "the problem of transaction costs" has been extensively refined by Richard Posner (1998), Oliver Williamson (1985), and Thráinn Eggertsson (1990). But the main weakness of neoinstitutionalism resides in its inability to look beyond the deeply capitalist societies of the western hemisphere, and except for a limited contribution by Posner (1981, 1983) on law and economics in ancient Greece and some "primitive" societies, the whole issue of whether the concept of "cost" would function in pre-capitalist societies has yet to be properly addressed.

6. The two volumes by Martin Horwitz (1977, 1992) on the history of American law are essential reading for anyone hoping to understand a history of a legal system. The history of American common law gives a unique glimpse at a system which for all practical purposes grew from scratch especially in its formative period—the nineteenth century. Thus, the concepts of property, contract, tort, and crime grew considerably in that period, and considering the historical limitations of the law and economics schools, Horwitz's approach provides a much more nuanced view of the interactions between law and its social and economic underpinnings in the United States: it was *as if* judges ruled and "made the law" by acknowledging the intrinsic power of laissez-faire economics and its *modus operandi.* Often associated with the Critical Legal Studies (CLS) approach (Kennedy, 1997), Horwitz's démarche tends to take less for granted the benefits of liberalism and laissez-faire economics than Posner and others.

Strangely enough, and despite the fact that common-law systems are quintessentially defined as "case-law," and despite the institutionalization of the "case" as a major pedagogical tool in academic circles, there is very little research—in a situation that reminds us of the current scholarship on Islamic and Middle Eastern legal systems—which is based on case-analysis. Of course, in Anglo-American law cases are titled and numbered, and every law book lists them abundantly, but they nevertheless remain poorly analyzed as cases on a one-by-one basis. There is always that hidden assumption that judges "apply" the general rules, and hence case-analysis will prove redundant. Except for a recent contribution by A.W. Brian Simpson (1995), there is little to account for in this area.

7. Another major weakness in current research is the lack of perspective in respect to other periods, systems, and societies. Some recent comparative studies tend to be too rigid in their compartmentalization (e.g., Zweigert & Kötz, 1998), while others are more aggressive in handling the classical distinction between civil-law and common-law systems (e.g., Mattei, 1997, 2000).

Alan Watson's work (1984, 1985, 1991) stands on its own in its broad attempts to historicize various legal systems in conjunction with one another, beginning with the Roman. Watson's main idea that legal systems do not solely evolve based on internal societal conditions and needs, but mainly by copying, patching, and adapting from other systems—the process of "reception" of Roman Law throughout Europe is one such example—is worthy of consideration. In the case of Middle Eastern societies, there has been, since the mid-nineteenth century, a process of "reception" of civil-law codes—mainly in their French and German flavors—in societies whose older doctrines and judicial systems were of a totally different nature. Needless to say, the *pièce-de-résistance* of research on modern Middle Eastern and Islamic legal systems ought to be on the repercussion of "reception" in those societies, and the whole problem of epistemic "continuity" with the old systems.

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